



# Massachusetts Law Quarterly

AUGUST, 1933

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## NOTICE.

Owing to the Editor's absence during the summer, this "August" number has been delayed until October. This accounts for the appearance in it of some recent professional news dated later than August.

The publication of articles in the QUARTERLY does not commit either the Association or the Publication Committee to the views expressed.

It is the present intention of the Editor not only to send out reprints of the annual report of the Judicial Council in the next number in December as usual but also to issue special numbers containing reprints of the reports of Special Commission on Crime and of the report of the Special Commission on Public Expenditures insofar as it relates to the courts.

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### THE PROFESSIONAL STANDARDS OF MASSACHUSETTS SINCE 1686 — THE OATH OF OFFICE — "I SOLEMNLY SWEAR THAT . . . I WILL CONDUCT MYSELF . . . WITH ALL GOOD FIDELITY . . . TO THE COURTS" — WHAT DOES THIS MEAN?

In all the current seething discussion of admission to the bar, disbarment, reinstatement, the nature of the judicial functions and duties under the thirtieth article of the Bill of Rights and the applicability of technical rules of procedure and practice in the performance of those functions and duties, most of us are apt to forget to examine the lawyer's oath of office to see if it throws any light on the problems which face a startled community as a result of the evidence of "jury fixing". The oath of office required to be taken and subscribed "in open court" on admission to the bar, as set forth in G. L. Ch. 221, Sec. 38, reads as follows:

"I, solemnly swear that I will do no falsehood, nor consent to the doing of any in court; I will not wittingly or willingly promote or sue any false, groundless or unlawful suit, nor give aid or consent to the same; I will delay no man for lucre or malice; but I will conduct myself in the office of an attorney within the courts according to the best of my knowledge and discretion, and *with all good fidelity* as well to the courts as my clients. So help me God."

(1)

The substance of the required oath is as old as the Massachusetts bar, for it was first required not by the legislature, *but by the court* when William Stoughton first served as chief justice in 1686. The first *statutory* provision for the oath was in 1701 and a further confirmatory act was passed, after the Revolution, in 1785.\* It has been required ever since, the early statutory requirements being, like the present statute, merely a recognition of the previous judicial practice. The thirtieth article of the Bill of Rights, recognizing the three great departments of the government, had behind it, therefore, ninety-four years of uninterrupted practice as to the direct relation of the courts and the bar reflected in the oath, which was, and is still, an oath, not to the legislature, but to people of Massachusetts as represented, not by their legislative department, but by their judicial department—an independent coordinate department of their government under the constitution.

What if any technical rules are applicable to the performance of the administrative duties of the courts in maintaining these solemn time-honored standards with which the Massachusetts bar was born? Are there any rules governing the courts in this direct relation except fairness and justice without technicalities?

We believe that the oath should be studied in connection with every proceeding for admission, disbarment, or reinstatement, because it discloses the foundations of the character of the bar as part of the judicial department—the foundation on which the bar must stand if it is to retain the confidence of the public and regain some of the confidence which appears to have evaporated, not wholly, of course, but to some extent. It is one of those “fundamentals”, the study of which is enjoined upon the community and upon their “lawgivers and magistrates” as necessary to its well-being by the eighteenth article of the Bill of Rights.

F. W. G.

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“JURY-FIXING”—EXTRACT FROM THE REPORT OF THE COUNCIL OF THE BOSTON BAR ASSOCIATION AND RESOLUTION OF THE ASSOCIATION.

At a largely attended annual meeting of the Bar Association of the City of Boston on October 7th, 1933, a report of the Council was read by the President, Robert G. Dodge, containing the following passage:

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\* See Bailey “Attorneys and Their Admission to the Bar,” 13, and Benton “The Lawyer’s Oath and Office,” 58-62.

"Regardless of the guilt or innocence of particular lawyers, the gravity of the situation cannot be overemphasized. The fact that during the past few years jurors in this county have been accepting bribes is established beyond peradventure. Many different jurors have admitted the receipt of money. The disclosures have outraged the community, and there is an insistent demand, in which we join, that immediate steps be taken to overhaul the process by which Suffolk county jurors are now selected to the end that the faith of the people in the courts may not be destroyed."

In the discussion which followed (as reported in the *Boston Herald*), Commissioner Carpenter (before whom the evidence of "jury-fixing" was brought out) stated that he had talked with thirty jurors who admitted being approached, and of this number twenty-five admitted that they had accepted bribes.

The following resolution was unanimously adopted:

"The association in annual meeting assembled, heartily coneurs in the statement in the report of the council with reference to the administration of justice in Suffolk county and particularly in regard to the corruption of jurors, and urges the council to take such steps as it may deem appropriate to bring about a remedy."

#### A PRESS COMMENT.

(Extract from editorial in the "Boston American" of October 10, 1933.)

"And how is it going to be stopped; how are these outrages which shock the community and impair their faith in justice and the courts to be terminated?

"By overhauling the jury system. So say the lawyers.

"WHAT ABOUT OVERHAULING THE LAWYERS? No mention of that, of course.

"What is a bribe? A bribe is a reward of treachery, a price of corruption.

"Does the juror pay himself to be bribed? He does not.

"A bribe has TWO parties to it—the one who takes it and the one who pays it.

"Bribery could not be effected unless it originated with the party willing and eager to pay the bribe. He is the one to be benefited most by the corruption.

"Well, then, who is the one to be most benefited, the one who pays the bribe? THE CORRUPT LAWYER, OF COURSE.

"Out of this very plain statement of the very plain and

very sordid condition which exists in the contamination of justice in Suffolk County, there is one very definite conclusion that can and must be drawn.

"The conclusion is this: BEFORE OVERHAULING THE SYSTEM FOR SELECTION OF JURORS WHO MAY BE BRIBED IN THE FUTURE, THE THING TO BE DONE IS TO OVERHAUL THE CORRUPT LAWYERS WHO HAVE THE MOTIVE, THE MEANS AND THE BOLDNESS TO OFFER THEM BRIBES.

"The good and decent lawyers know this to be true. They know it to be necessary.

"They ought not to be dissuaded from their good intentions by innocuous, blame-shifting resolutions."

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NOTE.

The investigation of lawyers in connection with fraudulent practices in accident cases and "jury-fixing" has been going on for many months before the Commissioner under direction of the Supreme Judicial Court\* and has resulted in the disclosure of the conditions which led to the resolution of the bar association. About 30 reports recommending disbarment or discipline of attorneys have been filed by the Commissioners and most of these have been heard and acted on by the court. The court now has before it cases involving lawyers charged with "jury-fixing." These cases are being presented to the court with assistance from representatives of the Boston Bar Association.

The resolution is not "blame-shifting." The investigation of the system of selecting jurors and of lawyers can proceed at the same time. The jurors in the Federal Court seem to be more carefully selected. A study of the Federal method may be helpful.

F. W. G.

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\* The proceedings resulting in the order directing the inquiry were printed in MASSACHUSETTS LAW QUARTERLY for February, 1932, pp. 40-47.

## HOW IT IS DONE.

*(From The Boston Post, October 11, 1933.)*

The Bar Association's demand that steps be taken to clear up the scandalous situation which recent jury bribery trials have disclosed is commendable.

But the association seems to believe that the remedy is in securing incorruptible jurors. That this would effectively squelch the jury bribing system is plain, but it does not go to the heart of the matter.

Everyone who knows anything about the courts knows just how the jury bribing game is worked.

Every lawyer with any amount of trial practice has one or more "handy men" at his call. These men look up evidence, round up witnesses and investigate jurors. Some of these "handy men" are more or less disreputable characters ready for any sort of a shady job.

Many of them do more than investigate jurors—they sound them out by personal interviews or by third party contact. It is a simple matter for them to size up a juror. A ten-dollar bill will buy some of them. Twenty-five dollars is considered a top sum unless a case involves a large sum of money.

What makes jury bribing a far easier task than most people would believe is that men will sell themselves for absurdly low sums.

A "handy man" will never allow his employer to know that he has bought a juror. But it is common practice for them to say to the lawyer who employs them that such and such a juror is right.

Now, no trial lawyer needs to be hit on the head with a club to realize what that means. But, of course, he can pretend to believe the expression conveys to him the idea that the juror is an honest man and can be trusted to deliver the right verdict.

It is almost impossible to trace actual cases of bribery to any trial lawyer. There are cases, undoubtedly, where the trial lawyer has little to do with the "fixing" of a jury—that matter might be attended to by those who employed him merely to try the case. Thus the man who pleads the case in court may be entirely innocent.

But there are other cases where lawyers deliberately avoid any connection with their "handy men" which will involve them in any unethical or dishonest practices. But they pay the "expense bills." These "handy men" of a certain type need no instructions.

An attorney's indignant denial that he ever sanctioned or even knew of jury fixing may be true. But, unless he is a complete and utter moron, and few lawyers are that, he has a pretty good idea of how his cases are won.

PROGRESS OF "AFFILIATION" OF BAR ASSOCIATIONS  
WITH THE MASSACHUSETTS BAR ASSOCIATION  
UNDER THE NEW BY-LAWS.

Following the report of a special committee, which is printed in the February number of the MASSACHUSETTS LAW QUARTERLY, new by-laws were adopted at the annual meeting of the Massachusetts Bar Association providing that any bar association might affiliate with the State Association by vote of its executive board and payment of an annual assessment of five dollars. Any member of a bar association thus affiliated may become a member of the Massachusetts Bar Association upon application accompanied by a certificate from the secretary of the affiliated body and payment of the annual dues of five dollars. All members of the Massachusetts Bar Association receive the MASSACHUSETTS LAW QUARTERLY without additional charge. Under the new by-laws, it is also provided that the executive committee of the Massachusetts Bar Association, in addition to the officers of the association, shall consist of the presidents (or some other member of each designated by them respectively) of such as may be specified by the Massachusetts Bar Association from time to time, and seven members elected at large.

Under these provisions, the following associations have "affiliated": Barnstable County Bar Association, Berkshire Bar Association, Bar Association of the City of Boston, Essex Bar Association, Fall River Bar Association, Franklin County Bar Association, Hampden County Bar Association, Hampshire County Bar Association, Bar Association of Middlesex County and Worcester County Bar Association. We are informed by the president of the Norfolk County Bar Association that that Association is expected to "affiliate" at the next meeting.

As a result of such action, the following representatives of these associations thus affiliated have automatically become members of the executive committee of the Massachusetts Bar Association:

Heman A. Harding, Chatham, President, Barnstable County Bar Association,  
John B. Cummings, Pittsfield, President, Berkshire Bar Association,  
Henry R. Mayo, Lynn, President, Essex Bar Association,  
Timothy M. Hayes, Greenfield, Delegated Representative of Franklin County Bar Association,  
James M. Healy, Springfield, Delegated Representative of Hampden County Bar Association,

Henry P. Field, Northampton, President, Hampshire County Bar Association,  
Joseph Wiggin, Waltham, President, Bar Association of Middlesex County,  
Daniel W. Lincoln, Worcester, President, Worcester County Bar Association,  
John V. Spalding, Boston, Delegated Representative, Bar Association of the City of Boston,  
Charles P. Ryan, Fall River, President, Fall River Bar Association,  
William C. Drohan, Brockton, President, Brockton Bar Association.

Edwin C. Jenney, President of the Norfolk County Bar Association will become a member of the Executive Committee as soon as "affiliation" is completed.

Thus eleven members of the executive committee of the Massachusetts Bar Association are chosen locally. When a new president is elected of such a local affiliated association, he will automatically succeed to the position of his predecessor on the executive committee, if that position was filled by the preceding president, rather than by a delegated representative. In the case of a delegated representative other than the president, he would continue to serve as a member until some new delegate was selected and the secretary of the Massachusetts Bar Association notified of the change.

In addition to these locally chosen members, the executive committee consists of the following officers *ex officio*:

Nathan P. Avery, Holyoke, President,  
Frederick N. Wier, Lowell, Last Preceding President,  
Horace E. Allen, Springfield, Treasurer,  
Frank W. Grinnell, Boston, Secretary,

and the following members elected at large:

Norman W. Bingham, Boston,  
Carl M. Blair, Worcester,  
Elias Field, Boston,  
Miss Sybil H. Holmes, Boston,  
Edward A. MacMaster, Bridgewater,  
John M. Merriam, Framingham,  
Sumner Y. Wheeler, Salem.

In order to avoid any misunderstanding which is occasionally expressed, it should be explained that the process of "affiliation" with the Massachusetts Bar Association does not involve any surrender whatever of local autonomy or independence. The apparent interest taken under the new plan seemed evident from the good

representation of members from different parts of the state at the first meeting of the new executive committee last March.

The attention of all members of associations which have become affiliated is called to the fact that under the new by-laws direct individual membership in the Massachusetts Bar Association, including as it does the opportunity to receive the MASSACHUSETTS LAW QUARTERLY, is open to any member of an affiliated association on application to the secretary accompanied by a certificate from the secretary of the affiliated association of membership in that organization and payment of the annual dues of \$5. which covers the right to receive the MASSACHUSETTS LAW QUARTERLY without additional charge. No intermediate action by the Committee on Membership of the Massachusetts Bar Association is required.

The MASSACHUSETTS LAW QUARTERLY, of which eighteen volumes have been published since it was established in 1915, appears four or five times a year and contains a considerable amount of information as to the history of statutes and constitutional provisions and discussions of various questions of law,—material likely to be found useful by practising lawyers,—much of which can not be readily found elsewhere. It also contains a considerable amount of material relating to legal history, particularly in Massachusetts, from time to time which is likely to be of interest to the bar. The new edition of "Shepard's Citations" and the new "Annotated Laws of Massachusetts" (now being published by The Miehie Company and the Lawyers Co-operative Publishing Company) both contain references to the MASSACHUSETTS LAW QUARTERLY in the citations and in the notes to the statutes. It has been announced by the publishers that these references will be continued in future supplements.

Members of the Massachusetts Bar Association "who neither practice nor have an office in the City of Boston" also have been accorded by the House and Library Committee of the Boston Bar Association the privileges of the rooms of that association in the Parker House, Boston. These privileges of the use of the association rooms, library and private dining-room, may be found both convenient and agreeable to men coming to Boston from a distance.

Applications from any members of affiliated associations should be sent to the undersigned accompanied by the certificate and the membership dues as above explained.

F. W. GRINNELL, *Secretary,*

60 State St., Boston.

A LETTER FROM THE PRESIDENT OF THE  
AMERICAN BAR ASSOCIATION.

*(The Editor has received the following letter with the request that it be published.)*

EARLE W. EVANS, PRESIDENT                   JOHN H. VOORHEES, TREASURER  
WILLIAM P. MACCRACKEN, JR., SECRETARY  
RICHARD BENTLEY, ASSISTANT SECRETARY

AMERICAN BAR ASSOCIATION  
1140 NORTH DEARBORN STREET  
CHICAGO, ILLINOIS

OLIVE G. RICKER,  
EXECUTIVE SECRETARY

SEPTEMBER 9, 1933.

*To all Members of the Bar:*

At the recent meeting of the American Bar Association at Grand Rapids, a nationwide movement was inaugurated which, in its accomplishment, will serve the public interest and will also directly benefit every member of the bar. When the history of our profession is written, the Conference of State and Local Bar Association Officials held on August 29th may constitute an important landmark.

At that meeting a National Bar Program was definitely decided upon. A project for focusing the attention of lawyers in all parts of the country on a few important subjects was adopted and will be carried out during the coming year.

The plan for a common effort to solve the most troublesome problems of the profession will go far toward establishing on a firmer footing the position of leadership in the affairs of state and nation rightfully belonging to the lawyer but which he now stands in danger of losing.

The subjects which were selected by the conference of bar association presidents and secretaries and which were ratified by the Executive Committee of the American Bar Association, were :

1. Criminal Law and its enforcement.
2. Legal Education and Admissions to the Bar.
3. Unauthorized Practitioners of the Law.
4. Selection of Judges.

A clearing house is being established in the office of the American Bar Association in Chicago, where information on these and other topics will be available and to which reports should be made of any action or activity in bar associations over the country. It is hoped in this way to crystallize the opinion of lawyers on these important matters and to develop a national sentiment which will represent the attitude of the bar.

An assistant will be working with me along these lines and every effort will be made in the office of the American Bar Association to be of assistance to the state and local organizations which may desire help in doing the contemplated task.

I feel that this is a great opportunity for the bar to exert its influence and by a unity of effort in terms of work make an important contribution to the improvement of the administration of justice.

A concrete program outlining steps to be taken by state and local bar associations to assist in this program will be sent out shortly.

I personally believe this movement is designed to promote the public welfare and I pledge myself to give the full support of my administration to it.

Faithfully yours,  
EARL W. EVANS,  
*President of the American Bar Association.*

#### A LETTER FROM THE SPECIAL CRIME COMMISSION.

Created by Resolves 1933, Chapter 54, approved July 22, 1933.

ROOM 415, STATE HOUSE, BOSTON.  
September 15, 1933.

*To the Members of the Massachusetts Bar Association:*

This Commission is now engaged in making a study of the crime situation in this state for the purpose of determining the cause thereof, and to suggest remedies which we believe will strengthen the administration of our criminal law. The Resolve (1933, Ch. 54), among other things, requires an investigation into the means now employed for the apprehension, conviction and punishment of certain violators of the law, including those engaged in the operation of pools and lotteries, slot machines, clubs dispensing intoxicating liquors, so-called speakeasies, and other illegal practices, and of persons who, although frequently before the Court, have not been adequately punished, and to determine the responsibility for existing evils relative to these matters, and to devise measures for improving the law.

From a preliminary investigation, it is apparent that in some communities, crime is so prevalent and common that it constitutes a serious menace to peace and security.

The support and co-operation of the Bar is essential to the success of the work of this Commission, and we respectfully request that the members of your association will give us all available assistance by disclosing any information they may have concerning existing abuses, and the remedies they think should be adopted.

Such information, if they desire, will be received and kept in confidence.

Furthermore, the Commission would deem it a privilege to meet with a committee of your association for a full and complete discussion of the problems confronting the Commission.

We are especially interested in determining if Grand Juries should be abolished; if District Attorneys should be appointed; if the power to nol pros should be restricted; if there should be single trial of misdemeanors, in either the District Court or the Superior Court, at the election of the defendant; if verdict should be by vote of a majority of jurors; if the judges should charge on facts; and if comment should be made on the failure of the defendant to testify. We would like to ascertain whether improvements could be made in police departments, in our probate, parole, or bail systems. Should certain rules of evidence be changed? What new criminal statutes are required? Should District Courts be abolished, and a circuit system inaugurated?

The aid of the members of this association in assisting us in the solution of these and similar problems will be appreciated.

Very respectfully yours,

FRANK L. SIMPSON,  
*Chairman.*

#### ATTACHMENT OF WAGES.

(From the "Springfield Sunday Union and Republican" of  
August 27, 1933.)

The distress often caused, especially in these times, by creditors trusteeing the weekly pay of wage earners received the attention of the judicial council in its last annual report. The council recommended a change in the statute so that "wages for personal labor and services be made subject to attachment only by leave first obtained from the court issuing the writ of attachment."

Requiring the consent of the court in the first instance, which is not now necessary, would interpose between the creditor and an honest but unfortunate debtor a safeguard against abuse of the process. It may be presumed that the court would be able to distinguish between "dead beats" and wage earners who really deserve lenient treatment.

The judicial council's recommendation was based on practical experience in wage attachment cases. While the Legislature at its last session did not see fit to restrict the notorious abuse of the trustee process, current reports of unemployed men going back to work only to run up against pitiless attachments on their wages seem to vindicate the wisdom of the judicial council rather than that of the Legislature.

GOVERNOR ELY'S CHICAGO SPEECH ON THE "N. R. A."  
INTRODUCTORY NOTE.

A member of the association suggested to the Editor recently that the thinking of lawyers was apt to be too limited in scope and that a legal periodical ought to print from time to time discussions of economic or social problems which would tend to broaden the thinking of the bar. We agree with him to the extent of recognizing that there are overlapping margins of varying sizes between the field of law and other common fields of thought, but as a general policy a legal periodical should stick to the ample material for discussion within the ever broadening field of professional thinking. Current conditions and problems in this period of transition are reviving necessarily the interest of American lawyers in the "fundamentals" which called for the hard thinking of the American bar more than a century ago, during the constructive period of the birth of the nation. Today the background of the constitutions is being thought out and sifted all over again. The federal government is trying experiments which some persons describe as, in substance, "dictatorship along the lines of current European models." Whatever any one thinks of these experiments, there is one outstanding fact which does not appear to be a part of the current European pictures, and that fact is the continued freedom of the American press and of the expression of individual opinion,—a freedom which we believe the President welcomes and wishes to encourage in order that it may assist him and his advisers in their difficult undertaking.

As one of the outstanding current contributions to the independent thinking of the country in regard to the "fundamentals" of American policy of the future, we reprint Governor Ely's address at Chicago before the Commercial Travelers Association on September twenty-first.

F. W. G.

GOVERNOR ELY'S ADDRESS.

(Reprinted from the "Springfield Union" of September 22, 1933.)

"Every time that I open the radio I hear some speaker decriing individualism and citing the glories of collectivism. They tell me that the old order passeth and that out of the new will come happiness for all. If the valedictory of the old order must be heard, then I wish to say just a word for it, perhaps not to protest the passing but to acclaim its accomplishments.

"Individual liberty, freedom of action, without the blighting and deadening oppression of Old World government was the very cornerstone of the New Republic. For 150 years it gave us the happiest nation in all history. I do not say that it was perfect. I do not say that under it all men were contented. But I do say that beneath no other flag, under no other system have so many enjoyed prosperity and happiness. I dare to say that for 150 years in these United States, eight out of every ten persons lived in peace and contentment.

"If I am to assume that the prosperity of the individualistic civilization is forever dead, then I must say that it died at the very height of its glory. It died when more than half of all our people could and did travel with more comfort and intelligence than ancient kings. If the prophet of old were to look down upon us even now, he would be forced to say that 'Solomon in all his glory was not arrayed like one of those.' I acclaim the majesty of the individual who under the spur of ambition conceived the possibility of steam and electricity. I acclaim the greatness of the individual who plucked from the air waves of expression and gave us radio, who harnessed the gasoline explosion and gave us the motor car. Ten generations yet unborn, would have been without the benefits of any of them except for the initiative of the individual, spurred to the accomplishment by the old desire to advance and to profit, and therefore to work.

"Based upon a rugged individualism, our ancestors subdued the wilderness, tilled the soil, uncovered the wealth of a continent, built homes, erected great cities and brought us a civilization where most men were happy. I cannot look upon all this and in the valedictory say that it was a worthless system. I cannot look upon all this and bury it as a dead and useless thing, to be discarded without tinge of regret, or without a tear. Neither can I with blind enthusiasm born of inflated emotion, put my hand to the lever of a new machine from which has been eliminated all the principles of the old.

"We have abused this system which has made us great. We have distorted its principles. We have forgotten its ideals and this tragedy created by selfish men consumes us with a burning anger. Even so I cannot view a socialistic state with complacency.

"Why speak of these things to you? Why extol the past and speak for the right to satisfy the craving for liberty, for freedom of action? Why extol the value of reward as an incentive for effort? Quite frankly, it is because of the danger which lies behind the effort to lift us from the mire of depression, through regulation and control of industry. As an emergency measure, it is a great democratic act of co-operation. As a permanent thing, it is state socialism. I propose to do what I can to keep it an emergency measure.

"You must not misconstrue the meaning of my words, nor their intent. The underlying motive of this drive is the motive of a great humanitarian. The President travels the most direct path to the

unfortunate victim of hard times, puts the Government at his shoulder to give him encouragement and assistance. He seeks to correct the inequalities of the past and to blot out the abuses of the selfish. From the welter of words and the confusion in execution of this tremendous undertaking, if but one thing is accomplished the movement is an unparalleled success. If it shall be imbedded in the consciousness of men that industry will attain its greatest success with a more equitable distribution of the profits of labor, then though it otherwise fails, the movement is worthwhile. When the industrialist recognizes this principle, as both humanitarian and economic, great progress has been made in our civilization. It is a recognition of more favorable working conditions and hours of work. It means relatively higher wages. It means more profit to labor and a smaller percentage of profit to capital. It means the elimination of waste and extravagance. It need not mean that we bury the individual beneath the shroud of oppressive governmental regulation.

"The usefulness of this great mobilization of the people is already apparent. It has quickened the pulse of the Nation. It has revived hope. It has brought to us a new outlook. It has stimulated industry. It has relieved the dole.

"My interest, however, lies in what is to follow and the way in which we are to use these new elements of recovery. Shall we retain the code idea? Shall we continue to hold industry, operating by permission as a vassal of the Government? Let me point out to you what it means to do that. It means that your right to exist in business depends upon the will of your rulers, whoever they may be now and hereafter. It means the power to destroy as well as to save. If we are to continue as a democratic State, this method is justifiable as an emergency. Except for that single justification it violates every principle of our form of government. It also creates instability in business and business requires fixed beacons to guide its course. Credit cannot be restored to business until the creditor can see the safety of his loan. He will not see a loan as safe until he can see fixed beacons to mark the course.

"The NRA, resting upon an emergency and the ideal of voluntary co-operation to put it across, is too uncertain as a permanent means to industrial peace. The people must be brought to know it for what it really is—an emergency undertaking gloriously conceived and carried out to change the downward trend—but useless as a permanent policy unless we abandon completely the capitalistic theory for the socialist state. There lies the danger.

"The very success of the movement adds to the gravity of the situation. It is a success which will persuade a great many people that a continuance of this process is the road to happiness and prosperity. Occasions are altogether too frequent in history to prove the futility of holding the people or the Government permanently to a pitch of emotional idealism. The let-down following the Great War from the Wilson idealism is a recent and still remembered example. You may save a life by artificial respiration but you

cannot permanently maintain it by that means. To encourage this movement beyond this emergency can lead only to a complete breakdown.

"This does not mean, however, that the situation is without hope. I for one feel no loss of confidence. I think that I can point out the beacons which are to set the course. This great movement has marked them. Let us lay down the fundamentals as law to which a newly enlightened industry may fit the intricacies of its business as the peculiar characteristics of each unit requires. Child labor in the factory must be forever abolished. We can strike that blow to the sweatshop. A Child Labor Amendment should be speedily adopted.

"The labor laws of our States should be made uniform. These laws must recognize the humanitarian and economic principle of the code, as to hours and working conditions. The principle of a living wage—a wage for decent living should become a part of our fundamental law, the breach of which would incur the placing of governmental restriction upon the free conduct of that business.

"The Anti-Trust laws are the product of competition. The Clayton and Sherman Acts seek to insure competitive prices—but competitive prices in these times are but a push in the downward trend of commodities and wages. These laws do not suit the times and their operation should be suspended to permit price fixing with government permission.

"Those are a few definitely positive beacons which may be erected to guide the course of industry. They may not be the only ones or the correct ones. In any event, the thought I desire to leave with you is that there should be concretely definite laws established if business is to prosper.

"Recognizing the NRA as an emergency program, I urge every citizen to give it a whole-hearted and unlimited support. That is your duty. Using this meeting as a public forum, may we not give thought to the future and begin the work of formulating concretely the course which this Nation is to take? You cannot view this Century of Progress Exposition, and look upon it with awe and wonder, without silently giving praise to the accomplishments of the Nation. And as the praise is silently given, you must be brought back to the realization that all these things were done under a system which cannot be passed by as worthless or useless."

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#### THE MOVEMENT TO REVIVE THE "CHILD LABOR" AMENDMENT.

In Governor Ely's Chicago address printed above, it is noticeable that he says, "A 'Child Labor' amendment should be speedily adopted." He does not urge the revival of the amendment proposed in 1924. With the movement throughout the country to "abolish child labor in the factory" and the "sweat shop" to which he gives his support, one may heartily sympathize, but to accomplish that object by the method of adopting the "child labor" amendment to the Constitution of the United

*(Continued on page 29)*

IF WE WERE THE "QUEEN OF HEARTS".

(*For Judges Only.*)

In the August number of the *Bar Bulletin* of the Boston Bar Association the editor closes a fanciful but practically suggestive discussion of some of the problems and causes of delay in the administration of justice, with the following words:

"If we were the queen [in 'Alice in Wonderland'], instead of 'off with her head' it would be 'out with the typewriter'. If we were one degree more powerful than the exalted lady just mentioned we should provide that a decision should be handed down in each case within 15 minutes after argument."

Such experience of life as we have had has led us to believe that the best introduction to the understanding of much of American life, history and government—the best method of reaching that detached position which shows many things in "perspective" is to read "*Alice in Wonderland*" and "*Alice Through the Looking Glass*." Accordingly, we quote from another queen—the "White Queen" in "*Through the Looking Glass*". When Alice said: "There is no use trying, one can't believe impossible things," the White Queen answered: "I dare say you haven't had much practice. When I was your age, I always did it for half an hour a day. Why, some times I've believed as many as six impossible things before breakfast. There goes the shawl again."

Now the suggestion that every case should be decided in 15 minutes after the close of the hearing, while it is not to be taken too literally, is a suggestion that is full of practical meaning.

In the QUARTERLY for January, 1929, pp. 17-18, we discussed the subject of "delayed decisions," in view of the reports which had come to our attention of cases from more than one court (and they were not all in district courts) in which decisions were delayed for periods varying from several months to two or three years. We refer to that discussion by way of a polite suggestion to some of our brethren on the bench of every court in the commonwealth as to the nature of the impression made upon the bar and the public by procrastination in the decision of cases and particularly in the decision of cases of public and professional importance which do not involve complicated questions of law but merely judgment and decision upon the evidence as to the facts and their consequences. The impressions and misunderstanding to which we refer are expressed in conversation with much greater freedom

and emphasis than is reflected here. Such misunderstanding may be illustrated by the remark attributed to the late Causten Browne, one of the witty members of the bar of an earlier generation, who, in speaking of some judge, said that he had twice as much to do as other judges because he not only had to decide what he ought to do in each case, but, after he had decided that, he had to decide whether to do it. We do not adopt this remark as our own characterization of the cause for some judicial delays. We simply refer to it to indicate the character of some comments which occasionally come to our attention. The reputation of the whole bench is, to some extent, in the keeping of each individual judge. Most of us are as familiar as judges with the various forms of temptation to procrastination. We do not all, however, realize fully the effect upon others of our own procrastination when we indulge in it. Perhaps this is particularly true of judges and as it is one of the functions of the bar, and one of the purposes of this magazine to assist the courts by calling to their attention from time to time in a respectful professional manner certain aspects of the administration of justice which might not otherwise come to their attention, we are publishing this discussion as a suggestion to be pondered by any judge of any court who may find it applicable to any situation which he may have before him.

Some members of the bench and some members of the bar, who appear to regard judicial work as more difficult than the work of competent, busy lawyers in active practice, may feel that prompt decisions are too difficult, or impossible at times, to be expected. It was with this possibility in mind that we quoted from the "White Queen" earlier in this discussion. The answer to such doubts is that it seems to be an essential part of the work of a judge to make up his mind and decide things, and that the community expects him to know, or to learn, how to do it. There is nothing uncommon about it and it is a reasonable standard of practice.

To avoid misunderstanding, we wish to emphasize the fact that we are not referring to cases in which there is a long report by a master or an auditor, or other voluminous documentary evidence, the careful examination of which requires time. We are referring to those cases heard directly by the judge mainly upon oral evidence given by witnesses in his presence,—cases that are tried in the same manner as they were fifty or seventy-five years ago before the use of stenographers and typewriters began. It is common for the Supreme Judicial Court, in its opinions, to attribute great

importance to the findings of the judge who saw and heard the witnesses. We suggest that much of the value and importance attached to the hearing and the seeing of the witnesses evaporates when a judge waits months or even years (and we are not speaking theoretically, but with actual cases in mind which have been called to our attention), and then depends upon his possibly inaccurate memory of his impressions at the trial. Justice delayed may be justice denied.

F. W. G.

### MODERN BUSINESSLIKE METHODS OF JUDICIAL ADMINISTRATION.

The remark of the late Professor Dicey has been often quoted, notably by the late John C. Gray in the introduction to his book on, "The Nature and Sources of the Law," that, "'Jurisprudence' is a word which stinks in the nostrils of a practising barrister"; but, as Mr. Dicey goes on to show "prejudice excited by a name which has been monopolized by pedants or imposters" should not blind us to the advantage of having clear, and not misty, ideals on legal subjects; and the late James C. Carter, in his posthumous volume on, "Law, Its Origin, Growth and Function," referred to the "underestimate among the members of our profession of the importance of theoretical inquiry".

Curiously enough, the same sort of prejudice appears to exist among members of the legal profession in many ways and in many directions against the very practical inquiries as to "businesslike" methods of administration and the views of "business" men or other intelligent and thoughtful laymen as to their impressions of judicial administration and its effect upon them and others.

Yet, ever since the well-known address of Dean Pound to the American Bar in 1908 on the "Causes of Popular Dissatisfaction in the Administration of Justice," the movement has been developing for the constantly closer study of methods of administration in the courts. Among other recent publications compiled for the information, not merely of lawyers but of the public generally, is the May number of "The Annals" of the American Academy of Political and Social Science containing some eighteen articles by different well-known men analyzing from different points of view the functioning of the American judicial system.

In one of these articles entitled, "The Executive Judge," by Edward B. Boies, appears the following description of the monthly reports and meetings of the Circuit Court of Wayne County, Michigan:

gan, since the reorganization of the business of that court in 1929. There appear to be some eighteen judges of that court. There is nothing very revolutionary about the practice described and we wonder whether some of the simple "businesslike" ideas involved in the picture might not be employed to some extent to the advantage of the bench, the bar, the litigants and the public in some of our Massachusetts Courts.

#### THE MONTHLY COURT REPORT.

"The rule defining the duties of the Presiding Judge requires him to make a monthly report to the bench of the work of the court for the preceding calendar month. This he does at a monthly dinner . . . paid for by two members of the court in rotation—a practice which has a stimulating effect upon the attendance of the other members of the court.

"This report is purely statistical. The figures are assembled by the assignment clerk who is under the direction of and responsible to the Presiding Judge. They cover the work of the court as a whole and of the individual judges of the court for the preceding month and for the court year up to and including the preceding month. The main items are: the number of court days spent by the court on each part of its work—chancery, law, criminal, appeals, and the two preliminary dockets; the number of cases of each kind disposed of by each judge and by the court as a whole; the number of cases of each class begun; the number disposed of—by trial and without trial, separately stated; the total number of court days, of five and one-half hours each, devoted to the business of the court by the local judges and the total so devoted by visiting judges; the total number of law cases begun and the total number disposed of during the period; the same as to the chancery cases; and the age of the oldest law and the oldest chancery case at the beginning and at the end of the period.

"This report presents a graphic, concrete picture of the work of the court and the condition of its calendar. It also indicates the relative share of the load which is being carried by the individual judges. A photostat copy of the report is given to each judge, but no comments are made except as to the work of the court as a whole. The report is not published, but is solely for the information of the court itself.

"It is, of course, impossible to indicate by figures the effect of a monthly report of this character upon the efficiency of the court; but it would be easy to underestimate it. Experience in Detroit and elsewhere demonstrates that with a statistical picture before their eyes of what the court is doing from month to month and what it must do to bring and keep its calendar up to date, as well as what each judge must do to retain the good will of the others, the judges of the court have a motive and a guide which are entirely lacking in the many courts which do not so chart their operations."

## DISCUSSION OF "INHERENT" POWERS OF THE COURTS.

In the "American Bar Journal" for September, 1933, pages 509-511, Mr. Charles A. Beardsley, former President of the California State Bar, protests against what he described as, "the judicial claim to inherent power over the bar", and seems to assume that the idea of regulation of the bar by judicial order would involve an attack on the constitutionality of the various state bar acts "integrating" the bar. In an editorial in the same number of the *Journal* (p. 513), it is pointed out, however, that no such constitutional result necessarily follows.

It seems to us Mr. Beardsley attributes too much importance to the use by various courts of the word "inherent". As the late Chief Justice Mason of the Superior Court wrote in 1891:

"The judicial history of Massachusetts is a record of the evolution of the judicial, as a distinct governmental function, and of the practical measures devised for its wise and efficient exercise as such. Notwithstanding the solemn prohibition which concludes our Bill of Rights, the process of evolution is not complete, but traces of obscurity in the dividing lines which separate the departments of government still remain."<sup>\*</sup>

The advisory opinion to the Senate in 1932, reported in 279 Mass. 607, has done much to clarify the subject. In that opinion the justices of the Supreme Judicial Court stated that:

"The establishment by the Constitution of the judicial department conferred authority necessary to the exercise of its powers as a *co-ordinate* department of the government. . . . There is nothing in the Constitution, either in terms or by implication, to indicate that the power of the judiciary over the admission of persons to become attorneys is subject to legislative control" (pp. 609-610).

In this connection, it is interesting to find in the "Notes" of the Commissioners to Revise the Statutes in 1835, in the note on page 59 to Sections 26 and 27 of Chapter 88 (of the Revised Statutes of 1836), which recognized the power of the court to regulate the bar, that the commissioners, the chairman of whom was Charles Jackson (for ten years a Justice of the Supreme Judicial Court and one of the best-informed lawyers of his day), said that the powers of regulating the bar "have always been

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\* See MASSACHUSETTS LAW QUARTERLY for November, 1916, p. 83.

exercised by the courts; and these two sections are proposed merely to prevent any inference that the provisions of this chapter are intended to take away or impair those powers".

As suggested in the report of the committee of the Conference of Bar Delegates printed elsewhere in this number the question whether the word "inherent" properly describes the powers which are incidental to the duties of the courts, in connection with many administrative matters, is of no special consequence. "Inherent" is not a "key" word in the discussion. The real question is one of practical sense as to the meaning of the division of functions in our system of government. The history of the "oath of office" and an analysis of its meaning, as suggested in the first article in this number, seems to have a direct bearing on that question.

F. W. G.

#### SPECIAL JUSTICES PRACTISING IN THEIR OWN COURTS.

Canon 31 of the Canons of Judicial Ethics, prepared by a distinguished committee of judges and members of the bar, of which the late Chief Justice Taft was chairman, and adopted by the American Bar Association in 1924, contains the following sentences. After referring to the fact that in the lower courts in some states justices are permitted to practice, the canon continues:

"In some cases one who practises law is in a position of great delicacy and must be scrupulously careful to avoid conduct in his practice whereby he utilizes or seems to utilize his judicial position to further his professional success.

*"He should not practice in the court in which he is a judge, even when presided over by another judge, or appear therein for himself in any controversy."* (A. B. A. Reports, vol. 57, p. 865.)

G. L. C. 218, § 17, has for many years prohibited such practice by the judge of a district court. The Judicature Commission, in its Final Report (H. 1205 of 1921, reprinted in MASSACHUSETTS LAW QUARTERLY for January, 1921, pp. 52-53), recommended the extension of the statute to cover special justices. The recommendation was not followed and, while many of the special justices in the Commonwealth refrain from such practice of their own accord, the practice of some in certain courts has been causing increasing public criticism ever since and will undoubtedly continue to do so until something is done to stop it, *at least*, on the criminal side of the court.

F. W. G.

"THE BAR BILL" RELATIVE TO "THE UNAUTHORIZED PRACTICE OF LAW" AS VETOED BY THE GOVERNOR, AS AMENDED IN ACCORDANCE WITH HIS SUGGESTIONS AND THEN REJECTED BY THE HOUSE OF REPRESENTATIVES.

The history of this bill and of the discussion in regard to activities of banks and trust companies which had preceded it for five or six years was told in detail in the QUARTERLY for February, 1932 (pages 59-69). The bill submitted to the legislature in 1932 was supported by the Hampden County Bar Association and with one dissenting vote by the Executive Committee of the Massachusetts Bar Association. It was defeated in the Senate in that year and was again introduced this year. In order that the bar may understand the exact form of the bill, the reasons for the governor's veto this year and the questions that arise in connection with such legislation, the bill in the form in which it was reported by the Committee on Legal Affairs, amended in the House and Senate and presented to the governor, is printed below, followed by the governor's veto showing the exact changes suggested by him and the subsequent action of the legislature upon the bill as thus amended.

H. 1423. AS REPORTED BY THE COMMITTEE ON LEGAL AFFAIRS,  
AMENDED BY THE HOUSE AND SENATE AND SUBMITTED  
TO THE GOVERNOR.

*(The proposed new words, not in the present statute, are printed in italics.)*

An Act relative to the Unauthorized Practice of Law and prohibiting Certain Acts and Practices.

1 SECTION 1. Chapter two hundred and twenty-one  
2 of the General Laws is hereby amended by striking  
3 out section forty-six and inserting in place thereof the  
4 following:—

5 *Section 46. It shall be unlawful for any individual*  
6 *or association of individuals, other than members, in*  
7 *good standing, of the bar of this commonwealth, to*  
8 *practice law, or by word, sign, letter, advertisement,*  
9 *or otherwise, to hold out himself or themselves as*  
10 *competent, qualified or able to practice law; provided*  
11 *that a member of the bar, in good standing, of any*  
12 *other state may appear, by permission of the court, as*  
13 *attorney or counsellor in any case pending therein;*  
14 *and provided, further, that nothing herein shall be*

15 construed as prohibiting an individual from maintaining, conducting or defending in his own behalf, in  
 16 any court of this commonwealth, an action to which  
 17 he is a party, or from preparing legal documents or  
 18 instruments for his own use or for use in connection  
 19 with matters in which he has a direct personal interest  
 20 as a party thereto; and provided, further, that  
 21 nothing herein shall prevent any individual from  
 22 appearing before the industrial accident board in  
 23 behalf of any injured person.

25 It shall be unlawful for any corporation to practice  
 26 or appear as an attorney for any person other than  
 27 itself in any court in the commonwealth, or before  
 28 any judicial body or the industrial accident board or  
 29 the board of tax appeals; or hold itself out to the  
 30 public or advertise as being entitled to practice law,  
 31 and no corporation shall organize corporations, or  
 32 draw agreements or other legal documents not re-  
 33 lating to its lawful business, or draw wills, or irrevoca-  
 34 ble trust instruments, or practice law, or give legal  
 35 advice, or hold itself out in any manner as being  
 36 entitled to do any of the foregoing acts, by or through  
 37 any person orally or by advertisement, letter or  
 38 circular; provided, that the foregoing shall not pre-  
 39 vent a corporation from employing an attorney in  
 40 regard to its own affairs or in any litigation to which  
 41 it is or may be a party; and provided, further, that  
 42 the foregoing shall not prevent any bank or trust  
 43 company or corporation lawfully doing business in  
 44 the commonwealth from furnishing to persons with  
 45 whom it may deal or who may apply for the same,  
 46 through its officers or agents, legal information or  
 47 legal advice with respect to investments, taxation,  
 48 stocks, bonds, notes or other securities or property.

49 The superior court shall have jurisdiction in equity,  
 50 upon petition of any bar association within this com-  
 51 monwealth, or of any member of the bar of this  
 52 commonwealth, to enjoin any person, association of  
 53 persons or corporation from violating any provision  
 54 of this section.\*

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\* This sentence is substituted for the sentence in the present section providing a criminal penalty as follows: "Any corporation violating this section shall be punished by a fine of not more than one thousand dollars; and every officer, agent or employee of any such corporation who, on behalf of the same, directly or indirectly, engages in any of the acts herein prohibited, or assists such corporation to do such prohibited acts, shall be punished by a fine of not more than five hundred dollars."

The substitution of civil proceedings, in section 46 for the criminal proceedings now provided, would be an improvement because criminal proceedings are futile in practice for such purposes and we label altogether too many things with the criminal stigma—a practice which breeds disrespect for the law and indirectly for the courts. As suggested in the discussion of this subject in the QUARTERLY for February, 1932, p. 65, equity jurisdiction is the only effective method of applying either section 46, or section 41.

1 SECTION 2. Said chapter two hundred and twenty-  
 2 one, as amended in section forty-seven by section  
 3 eight of chapter three hundred and forty-six of the  
 4 acts of nineteen hundred and twenty-five, is hereby  
 5 further amended by striking out said section forty-  
 6 seven and inserting in place thereof the following:—

7 *Section 47.* The preceding section shall not apply  
 8 to any public service corporation or any corporation  
 9 lawfully engaged in the business of insurance\* or  
 10 *suretyship, or its agents or employees, in carrying on*  
 11 *its lawful business, or to any corporation lawfully*  
 12 *engaged in the examination and insuring of titles to*  
 13 *real property, or to any individual engaged in the*  
 14 *examination of such titles, or to any corporation*  
 15 *lawfully engaged in assisting attorneys to organize*  
 16 *corporations, or organized for and lawfully engaged*  
 17 *in benevolent or charitable purposes, or organized*  
 18 *under the authority of the commonwealth for the*  
 19 *purpose of assisting persons without means in the*  
 20 *pursuit of any civil remedy, or to any automobile*  
 21 *club or association furnishing the services of an*  
 22 *attorney or attorneys to its members; nor shall said*  
 23 *section prohibit accountants from giving advice, and*  
 24 *preparing reports, tax returns or other documents*  
 25 *necessary or incident to the practice of their pro-*  
 26 *fession, or prohibit accountants from appearing be-*  
 27 *fore the board of tax appeals or any other body that*  
 28 *so permits by its rules, or prohibit any newspaper*  
 29 *from answering inquiries through its columns, or*  
 30 *prohibit any corporation from providing legal advice*  
 31 *or assistance to its employees or its subsidiaries, or*  
 32 *prohibit any corporation or partnership lawfully*  
 33 *engaged in the business of conducting a mercantile*  
 34 *or collection agency or adjustment bureau from em-*  
 35 *ploying an attorney to give legal advice concerning,*  
 36 *or to prosecute actions in court relating to, the ad-*  
 37 *justment or collection of debts and accounts, only;*  
 38 *nor shall said section prohibit any persons from draw-*  
 39 *ing agreements, leases, deeds or mortgages relating to*  
 40 *real estate over which they have the management or*  
 41 *control, or in which they have a property interest or*  
 42 *an interest as broker, manager or agent.*

1 SECTION 3. *Nothing in this act shall be construed*  
 2 *as a limitation upon the courts of this commonwealth*  
 3 *in the exercise of their power to decide what acts*  
 4 *constitute the practice of law, or as a limitation upon*  
 5 *their power to enjoin and punish as a contempt of*  
 6 *court unlawful practice of law.*

\* The present section contains the following words at this point, "against liability for damages or compensation on account of injury to persons or property."

After the bill, thus reported by the Committee, was read a third time in the House on May 16, the journal of that date shows that

"Mr. Dever of Cambridge moved that the bill be amended by inserting after section 2 the following:—'SECTION 3. Section forty-nine of said chapter two hundred and twenty-one, as so appearing, is hereby repealed.' After remarks the amendment was adopted.

Mr. Woeckel of Methuen then moved that further consideration of the bill be postponed until after disposition of the remaining matters in the Orders of the Day; and after debate this motion prevailed, by a vote of 64 to 45."

Section 49, to be repealed by this amendment, is as follows:

*"Section 49. Any person of good moral character, unless he has been removed from practice as an attorney under section forty, may manage, prosecute or defend a suit if he is specially authorized by the party for whom he appears, in writing or by personal nomination in open court."*

The House Journal of May 17, shows that

"Mr. Meehan of Lawrence moved that the bill be amended in section 2 by inserting after the word 'association', in line 21, the words 'or labor organization'; and after remarks the amendment was adopted.

After debate on the question on passing the bill, as amended, to be engrossed, 52 members voted in the affirmative and 54 in the negative. . . . on the roll call 135 members voted in the affirmative and 79 in the negative."

So the bill as amended was passed to be engrossed and sent up for concurrence.

In the Senate, the Journal of May 24 shows that the bill thus sent up

"was read a third time and was amended in section 2, on motion of Mr. Nutting, by a vote of 18 to 4, by striking out, in lines 40 to 42, inclusive, the words 'over which they have the management or control, or in which they have a property interest or an interest as broker, manager or agent'."

The bill as amended was then rejected by a roll call vote of 20 to 19. This vote was reconsidered on May 25 by a roll call of 21 to 11 and the bill was then passed to be engrossed. The Senate amendment was accepted by the House and the bill, with the several amendments above explained, was submitted to the governor later in the month.

## THE VETO MESSAGE (H. 1549).

EXECUTIVE DEPARTMENT, BOSTON, June 27, 1933.

*To the Honorable Senate and House of Representatives:*

Under the provisions of Article LVI of the Amendments to the Constitution, I am returning herewith House Bill 1423 entitled, "An Act relative to the Unauthorized Practice of Law and prohibiting Certain Acts and Practices", with the recommendation that it be amended as follows:

By striking out in line 43, section 1 of said Act after the word "company" the words "or corporation". By inserting in line 14, section 2 of said Act after the word "titles" the words "but where in the exercise of such business, such corporation or individual shall be called upon to perform acts heretofore performed by attorneys, such acts shall be performed through agents or employees who shall be members of the bar in good standing". By inserting in line 31, section 2, after the word "subsidiaries" the words "but such legal advice shall be furnished through agents or employees of such corporation who shall be members of the bar in good standing".

I assume that the purpose of this legislation is to keep the practice of law as a profession, to eliminate corporations as practitioners, and to protect against the competition of lay advisers. If that is its purpose, the Act as passed appears to be somewhat wide of the mark, and by inference to legalize corporate and individual participation beyond the present understanding of legitimate practice of the law.

I believe that the changes recommended, if adopted, will serve to correct the defects to which I refer.

JOSEPH B. ELY.

The House Journal of June 28 shows that the engrossed bill (House, No. 1423, amended), returned by the governor with a recommendation of amendments specified by him (see House, No. 1549), was considered.

"The amendments recommended by His Excellency were adopted as follows:—In section 1 striking out, in line 43, the words 'or corporation'; and in section 2 inserting after the word 'titles', in line 14, the words 'but where in the exercise of such business, such corporation or individual shall be called upon to perform acts heretofore performed by attorneys, such acts shall be performed through agents or employees who shall be members of the bar in good standing', and inserting after the word 'subsidiaries', in line 31, the words 'but such legal advice shall be furnished through agents or employees of such corporation who shall be members of the bar in good standing'.

Sent up for concurrence."

The Senate Journal of *July 10* shows that

"The Senate adopted the pending amendment to the House amendments in section 2, previously moved by Mr. Putnam, inserting before the words inserted by the House after the word 'subsidiaries', in line 31 (as printed), the words 'or companies or associations under its operation or management'."

By a roll call vote of 19 to 12 the House amendments as thus further amended were adopted and the bill went back to the House which on July 12 adopted the Senate amendment and then, on July 18, when the engrossed bill was placed before the House for enactment,

"Pending the question thereon, Mr. Airola of Revere moved that the bill be amended further by striking out the enacting clause. After debate the amendment was adopted, by a vote of 80 to 37; and the bill was placed on file."

#### DISCUSSION OF CERTAIN QUESTIONS SUGGESTED BY THE "BAR BILL."

##### *The "Twilight Zone" Between the Judicial and Legislative Departments.*

In the "Bar Bulletin" for August, 1933, the editor commented on this situation as follows:

"House Bill 1423 necessarily raises the question of what may be called the 'twilight zone' between the judicial and legislative departments.

"About one year ago, the Justices of the Supreme Judicial Court, answering questions propounded by the Senate, gave it as their opinion, 279 Mass. 607, that 'no statute can control the judicial department in the performance of its duty to decide who shall enjoy the privilege of practising law.' It would seem to follow that no statute can control the judicial department in the performance of its duty to decide what constitutes the practice of law. Otherwise, the legislature could sweep the bar away by simply enacting that the giving of legal advice and the trial of cases shall not be held to be practising law.

"Some such thought must, we think, have been the father of section 3 of House 1423, reading:

'Nothing in this act shall be construed as a limitation upon the courts of this commonwealth in the exercise of their power to decide what acts constitute the practice of law, or as a limitation upon their power to enjoin and punish as a contempt of court unlawful practice of law.'

"In the opinion of the BULLETIN, House 1423, even without Section 3, conveyed no new power to the judicial department. Believing, as we do, that the courts have inherent power to define practice of the law, and to restrain illegal practice, it seems to the BULLETIN that legislative acts dealing with unlawful practice of the law are not particularly important."

*Practice by Laymen Under Special Powers of Attorney.*

The editor of the "Bar Bulletin" also commented on the fact that the present law leaves

"untouched G. L. Chap. 221, Sec. 49, under the protection of which laymen, armed with powers of attorney, are prosecuting and defending actions to their hearts' content. Section 49 has an historic interest, as it goes back as far as 1789, —and perhaps further. Its obvious purpose, we think, was to enable a party litigant to select some friend to represent him, and if limited in that way it is not objectionable. It was certainly never intended to be used by laymen as a means of livelihood. The abuse of the privilege is notorious. There has developed a sort of professional layman, whose advantage over the lawyer is that he knows no ethics and practices none. There can be no doubt that the justices who have borne in suffering silence the untrained guidance of the lay lawyer would be glad to put an end to the abuse if the bar should exert itself to that end.

"It is submitted that a simple rule of court would put a quietus on the activities of the professional layman. If the bar is really desirous of curbing this particularly obnoxious form of lay activity, it could no doubt, in conjunction with the bench, devise a rule which would restrict the use of powers of attorney under Section 49 and eliminate the layman who makes a living by successfully soliciting powers of attorney to try cases."

The practice of laymen appearing under special powers of attorney doubtless goes back to the Colonial period in the seventeenth century when there were no lawyers in Massachusetts. The prejudice against lawyers resulted in their practical exclusion from the colony and the men who were allowed to act as attorneys in court, as pointed out by Judge Washburn in his, "Judicial History of Massachusetts," pages 50-51, were tailors, merchants, apothecaries and physicians of "little personal character" and others like them.

One result of this lack of a trained bar of character was that in order to avoid even these attorneys a pernicious practice grew

up of applying to the magistrate directly, instead of through the lawyers. Rev. John Cotton preached against this practice in his "Election Sermon" as early as 1641.

The late Nathan Matthews attributed the downfall of the Puritan "state" largely to the lack of a trained bar.\*

Another result of the lack of a trained bar was the practice of running to the legislature to appeal from the judgments of the courts. This practice continued until it was stopped by the twenty-ninth and thirtieth articles of the Bill of Rights in the Constitution of 1780.

The questions today seem to be as to the nature and extent of the powers which are incidental to the constitutional *duties* of the courts in dealing with changing conditions—*duties* resulting from the division of functions between co-ordinate departments in 1780.

At the meeting of the Executive Committee of the Massachusetts Bar Association in March, 1933

*"It was Voted that the Secretary call to the attention of the Chief Justice of the Supreme Judicial Court the increasing activities of persons who are not members of the bar, but who are nevertheless actively practising law both in and out of court under special powers of attorney, and that the suggestion be submitted for the consideration of the court whether the matter might be regulated by some rule or standing order within the general supervisory powers of the court."*

F. W. G.

\*See MASSACHUSETTS LAW QUARTERLY for May, 1928, 73.

#### THE MOVEMENT TO REVIVE THE "CHILD LABOR" AMENDMENT.

(Continued from page 15)

States as it was submitted to the states by Congress in June, 1924, is a very different matter. That proposed amendment involves powers far beyond the "abolition" of "child" labor in factories and "sweat shops".

The country is in the midst of the process of repealing an amendment to the Constitution of the United States which was adopted during a wave of patriotic humanitarian idealism. The repeal is the result of practical experience under a colossal constitutional mistake resulting from the emotional idealism following the war, to which Governor Ely refers. He has been one of the outstanding leaders in the country in this movement for repeal and for the substitution of a reasonable system of control of the liquor traffic. Today, the country is again in a state of patriotic emotional idealism somewhat similar to that which led to the adoption of the eighteenth amendment. Would it be wise to adopt another amendment to the Constitution of the United States of so far-reaching a character "under the influence" of this emotional idealism, however desirable the "uniformity" of labor conditions throughout the country may be? Under the impulse of the "N. R. A.", we understand that there has been a marked change in the practice of employing child labor in different parts of the country and this federal impulse is likely to have permanent effect in developing local sentiment, which must be the permanent basis of improved practices.

(Continued on page 61)

**THE RESOLVE DIRECTING AN INQUIRY INTO THE DISTRICT COURT SYSTEM BY THE COMMISSION ON PUBLIC EXPENDITURES AND THE STORY OF THE DEVELOPMENT OF THE DISTRICT COURTS DURING THE PAST TWENTY-FIVE YEARS.**

The Secretary of the Association attended a hearing at the State House on September seventh, before the Sub-committee on the District Courts of the Wragg Commission on Public Expenditures. Senator Wragg is chairman of the commission and Charles F. Campbell, Esq., of Worcester, is chairman of the sub-committee.

For the convenience of the sub-committee, a letter was subsequently written containing in a general way the story of the district courts during the past twenty-five years with references to the books and pages showing the changes which have taken place with reasons for them and the further developments which have been suggested and explained for consideration by the legislature and others whenever it seems advisable. As the details of this story, the relation between the various changes that have been made and suggested and the policy in the background of these changes may not be familiar to all members of the bar, the letter is printed here for their information with a view to provoking discussion and possibly inducing practical suggestions which may be of assistance to the Commission on Public Expenditures, to the Judicial Council, to the special Commission on Crime, of which Professor Frank L. Simpson is chairman, and, ultimately, to the legislature. It is, perhaps, needless to point out that any comments or opinions expressed in this letter which are not quoted or summarized from statements of others are merely the individual comments and opinions of the writer of the letter, for which no one else is responsible.

Any suggestions in regard to the subject discussed will be welcome.

F. W. G.

**RESOLVE CHAP. 55 OF 1933.**

**PROVIDING FOR AN INVESTIGATION AND STUDY BY A SPECIAL COMMISSION OF THE GENERAL SUBJECT OF PUBLIC EXPENDITURES.  
[INCLUDING A STUDY OF THE DISTRICT COURT SYSTEM.]**

*Resolved*, That a special commission, consisting of four members of the senate to be designated by the president thereof, twelve members of the house of representatives to be designated by the speaker thereof and five members to be appointed by the governor,

is hereby authorized to sit during the recess of the general court to investigate and study the general subject of public expenditures, including, in addition to expenditures by the commonwealth, such expenditures by counties, cities, towns and districts as are required or encouraged by the commonwealth, to consider ways and means for curtailing, limiting and reducing such expenditures, to consider the advisability of repealing or modifying any existing legislation which necessitates or encourages the making of public expenditures unwisely or beyond the reasonable means of the public in view of existing conditions, and generally to investigate and study the entire problem of public expenditures with a view to alleviating the burden thereof. *It shall particularly investigate the subject matter of current senate documents twenty-nine, four hundred and eight and four hundred and thirty-six, and current house documents seven hundred and two and fourteen hundred and seventy-five. Said commission shall also investigate and report relative to the advisability of enacting legislation requiring justices of district courts to give their entire time to the discharge of their judicial duties and forbidding such justices to engage in the general practice of law.* Said commission may hold hearings and may call upon the commissioner of corporations and taxation and other departments, commissions, officers, committees, and agents of the commonwealth and of the several counties, municipalities and districts for such information as may be needed in the course of its investigation and study. Said commission shall be provided with quarters in the state house or elsewhere, and may expend for expert, clerical and other services and expenses such sums, not exceeding, in the aggregate, four thousand dollars, as may hereafter be appropriated. Said commission shall report to the general court the results of its investigation and study, and its recommendations, together with drafts of legislation necessary to carry its recommendations into effect, by filing the same with the clerk of the senate not later than December thirty-first in the current year.

*Approved July 22, 1933.*

NOTE.

Senate 436 specified in this resolve concerned the "general subject of organization of the district courts of the commonwealth, with a view toward a reorganization and consolidation thereof."

THE STORY OF THE DEVELOPMENT OF THE DISTRICT COURTS IN THE  
LAST TWENTY-FIVE YEARS.

SEPTEMBER 12, 1933.

CHARLES F. CAMPBELL, Esq.,

Chairman of Sub-committee on Public Expenditures,  
Room 245, State House,  
Boston, Massachusetts.

DEAR SIR:

As I stated at the hearing before your sub-committee on the District Courts on September seventh, I feel that the best way in

which I may be of assistance to your commission is to submit in this letter a brief account of what has happened in the district courts in recent years with references to the books and pages where the explanations and reasons for such changes are to be found, and also to call your attention (with references to the books and pages) to the various proposals for more businesslike and economical methods and arrangements, which are still waiting for further consideration at such time as the legislature may consider it advisable.

The modern development of the district court system practically began with the pamphlet of Mr. Justice Lummus (then Judge of the Lynn District Court), in 1909, on, "The Failure of the Appeal System," and the report of the commission appointed in 1911 to study the Suffolk County District Courts. Chief Justice Bolster, of the Municipal Court of the City of Boston, was chairman of this commission. The report was numbered "House Document 1638" of 1912. Following the recommendations in that report, the legislature in 1912, by Ch. 649 (which now appears in G. L. Ch. 231, s. 103 *et seq.*), tried the experiment of doing away with the old appeal system in civil cases in the Boston Municipal Court, and provided the present system, under which a plaintiff waives a jury trial by bringing his suit in that court and the defendant, if he wishes a jury trial, must promptly remove his case to the Superior Court and if he does not do so he also waives his right to a jury. This eliminated the expensive and dilatory double trials in civil cases. By the statute, the Appellate Division of the Boston Court, made up of three judges assigned by the chief justice, was created to hear questions of law with a further appeal, if desired, to the Supreme Judicial Court.

This legislation of 1912 is the basis of all the subsequent history of the district courts.

In 1915, Chief Justice Bolster, at the request of the Boston City Council, made a detailed report on the business of the Municipal Court of the City of Boston, which was printed as a city document in 1916.

In 1919, the legislature created another special commission, called, "The Judicature Commission," which consisted of three men, the late Mr. Justice Sheldon, formerly of the Supreme Judicial Court as chairman, George R. Nutter of Boston and Addison L. Green of Holyoke. This commission was created to study the entire judicial system. It was in existence for about fourteen months and filed two reports.

The first was printed as House Document 597 of 1920. This report was devoted entirely to the proposal for "informal procedure for small claims" of \$35. or less, to be established in all the district courts at an expense of \$1. for entry fee and eighteen cents for service of the claim by registered mail instead of by an officer. The bill recommended by that commission with some changes was adopted by the legislature by St. 1920, Ch. 553. It provided the first state-wide procedure of its kind in the country and

enabled persons to present their small claims to a judicial tribunal without the expense of lawyers and with as little red-tape and other expense as possible. The fears expressed by some members of the bar and of the legislature at that time as to the effects of this plan have all proved groundless, and the procedure has successfully fitted itself into the life of the community, as shown by the statistical tables of district court business which appear in the annual reports of the Judicial Council. The table facing page 70 of the eighth Report shows more than 23,000 cases a year in the district courts, other than the central Boston Court, and the tables on pages 88-89 show about 1400 cases a year in the central Boston Court. By St. 1928, Ch. 144, the legislature raised the amount covered by the small claims procedure from \$35 to \$50.

The second and final Report of the Judicature Commission was numbered "House Document 1205" of 1921. The report contains a full table of contents on pages 3-5. That report opened with the following quotation which may be of special interest to your Commission on Public Expenditures:

"We regard the courts as a business institution to give the people seeking their aid the rights which facts entitle them to, and that with a minimum of time and money. We are a poor and a busy people. We cannot afford to waste either time or money."

"These few simple words seem to express the primary purpose of a judicial system in Massachusetts, and to furnish the practical tests to be applied by this commission in studying the existing system of Massachusetts. . . ."

The report contains a picture and outline of the judicial system with its cost, followed by a study of its various parts and of suggestions made in regard to it and by recommendations concerning different parts of the system.

The first recommendation of importance was for the creation of the Judicial Council as an advisory body for the continuous study of the judicial system, for reasons stated on pages 25-28. This council was recommended on the ground that the judicial system was too large a subject to be dealt with by any temporary commission such as those that had been appointed at intervals of ten or fifteen years in the past (a list of which was inserted on pages 166-168 of the Report); and that the administration of justice, like any large modern business undertaking, called for continuous study. This suggestion was first adopted in Ohio and thereafter was adopted by Massachusetts in 1924. Since that time, the movement has spread throughout the country so that there are now, I think, more than twenty Judicial Councils in different states. Most of them, I think, are advisory, created on the plan suggested and adopted in Massachusetts.

After discussing proposals to "unify" the courts (pages 22-25),

the commission discussed the district court system quite fully (pages 33-58), beginning with a brief account of their history, of criticisms in regard to them and suggestions for a centralized circuit system which had been made from time to time ever since 1886.

The commission then recommended an extension to all the other district courts of the procedure in civil cases eliminating appeals and double trials on the facts, which, as already stated, had been successfully tried for ten years in the central Boston Court, following the legislation of 1912.

The commission also recommended the creation of the Administrative Committee of the District Courts, for reasons which appear on pages 33-37. This committee was recommended as an advisory body.

These two proposals for an extension of the practice in civil cases including a provision for appellate divisions on questions of law and the creation of the Administrative Committee were adopted by the legislature by St. 1922, Ch. 532, and have been in operation ever since. Judge Hibbard, of the Pittsfield District Court, has been a member and secretary of that committee ever since its creation. As was explained to you at the hearing, the committee has accomplished a great deal more than either the community or the bar in general realize in the development, through the process of discussion, suggestion and advice, of the seventy-two District Courts of Massachusetts from isolated units into a system.

The general plan of the Judicature Commission as to the development of the district courts was in the direction of making them more responsible and important tribunals in the eyes of the public, of the bar, of the legislature and of the appointing power. It was realized that this would be a gradual process but, in spite of drawbacks, much more has been accomplished in this direction than is generally appreciated, and figures show whenever there has been an increase in the jurisdiction and functions of such courts the use of them by the bar also has increased.

The second recommendation made by the Judicature Commission, on pages 40-42, was the removal of all jurisdictional financial limits from the district courts so that suits for any amount, however large, might be brought in any court and tried there if the defendant was satisfied to leave it there. This recommendation was adopted by the legislature eight years later by St. 1929, Ch. 316.

Various other recommendations or suggestions of detail were made by the commission (pages 42-57). Of these, that relating to the revision of the Poor Debtor Law was substantially carried out by the legislature by St. 1927, Ch. 334.

In connection with the Boston Courts, the commission called attention to the recommendation for consolidation into a circuit system, which had been made in 1912 by the special Commission on the Suffolk County Courts, and later by the Boston Finance Commission in its report of February 11, 1920. This proposal for consolidation of the Suffolk County Courts into a circuit system has

many businesslike features which seem to deserve careful consideration. The Judicature Commission, on pages 95-96, also recommended a plan, the substance of which Mr. Flaherty supported at your hearing the other day, relative to the administration of criminal law in the Boston Municipal Court. This recommendation was made in the form of a carefully drawn act, which appears in the Appendix to the Report, pages 147-149. In substance, it provides that a defendant charged with an offence in the Boston Court should elect whether or not he wishes a jury trial. If he does, the case should be removed forthwith to the Superior Court; if he does not, he should be tried in the lower court and instead of the present provision in the law for an appeal on the whole case, including facts, law and sentence, to the Superior Court, that a Reviewing Board of three judges of the Boston Municipal Court, to be assigned by the Chief Justice as in the case of Appellate Divisions, should be created for the summary review of sentences. This essential part of the plan has not always been appreciated in discussions of it. It is common knowledge that most criminal appeals are for the purpose of an attempt to cut down the sentence and in practice amount to appeals to an overloaded district attorney's office for the purpose of negotiating a recommendation of a lower sentence. An essential feature of the proposed plan, therefore, is to create a genuine judicial tribunal for the prompt review of sentences to take the place of this unjudicial system of appeal to the district attorney's office.

This recommendation of the Judicature Commission has been renewed by the Judicial Council as a method of saving time and money and avoiding duplication of judicial work (See Eighth Report, pages 40-41).

The plan was reported by the Judiciary Committee of the legislature for the whole state in Senate Document 361 of 1923, but as explained to your committee the other day, it was rejected by the Senate at that time and the recommendation of the Judicial Council in its eighth Report has been in favor of trying the experiment, as other experiments have been tried, in the central Boston Court, where it can be tried most simply because of the fact that court has nine justices and several special justices, so that the creation of the essential feature of a Reviewing Board for sentences can be carried out without difficulty.

Shortly before the completion of the final Report of the Judicature Commission, a suggestion was made by the late Justice Callahan, of the Superior Court, for breaking the congestion in the criminal dockets of that court and securing the more prompt administration of the criminal law by the use of District Court judges in the Superior Court for the trial of appealed misdemeanor cases, etc. This suggestion was briefly referred to on page 102 of the report of the commission and was subsequently explained by Mr. Green, to whom the suggestion was made by Judge Callahan, at the meeting of the Massachusetts Bar Association in

1921 (See MASSACHUSETTS LAW QUARTERLY, January, 1922, pp. 23-25). A bill was subsequently drawn, approved by members of the Judicature Commission, and printed for public consideration in the MASSACHUSETTS LAW QUARTERLY for January, 1922, pp. 109-111. This plan was favorably received and was adopted by the legislature as a temporary experiment by St. 1923, Ch. 469. This act substantially accomplished its purpose of breaking the congestion of criminal cases in the Superior Court.\* The legislature has continued it in operation from time to time, the last continuation being by St. 1932, Ch. 157, which extended the act until December 31, 1935. The constitutionality of this act was sustained by the Supreme Judicial Court in *Com. v. Leach* in 1923 (246 Mass. 464).

In 1916, a special commission was appointed to consider the question of abolishing the trial justice system. The report of this commission (Senate 347 of 1917) resulted in legislation (St. 1917, Ch. 326) abolishing all but ten of the trial justices and providing that those ten remaining offices might be discontinued at the discretion of His Excellency the Governor, upon the expiration of the commission of any one holding the office. The annual reports of the Judicial Council contain tables showing the criminal business of these various trial justices from year to year (See table, p. 71, of the Eighth Report). They have no civil jurisdiction. It appears from the newspapers that the question whether the office of trial justice in Ludlow shall be discontinued is now under consideration by His Excellency the Governor.

Since the creation of the Judicial Council in 1924, a number of recommendations have been made relating to the district courts, some of which have been adopted as already stated. The problem of expense and effective administration, as pointed out by Representative Baker at your hearing the other day, is not confined to the district courts, and, accordingly, some of the recommendations have related both to the Superior Court and to the District Courts.

At the hearing the other day, Mr. Flaherty argued at some length before your committee in favor of taking the traffic violations out of the criminal law and out of the courts entirely, on the ground that they were not properly classed as "criminal" offenses and should be dealt with in an administrative manner. His suggestion was that they should all be turned over to the Register of Motor Vehicles, who should revoke or suspend licenses without appeal. While I do not agree with his remedy I think Mr. Flaherty's view that it is unfortunate that these minor traffic violations are treated as "crimes" is shared by a great many people in the community, and that the excessive number of things that are classed as "crimes" breeds lack of respect for the criminal

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\* While this act has been successful so far as the Superior Court is concerned, it tends to weaken those district courts from which the regular justice may be drawn for considerable periods of time if he proves effective in the Superior Court sessions. Such courts are left to special justices and the continuity of care and system may be broken. For this reason the recommendation of the Judicial Council in its report was for extension of the act from time to time until some alternative system is devised for relieving the criminal docket of the Superior Court.

law, as well as causing frequent injustice in some way or other by branding law-abiding citizens with a criminal record because of some inadvertent traffic violation.

This view has been shared by the Judicial Council, which referred to the matter in its first Report, pages 30-31. At the request of the legislature in Resolves, Chapter 37 of 1926, the Judicial Council in its second Report, pages 13-28, made a first attempt to work out a plan for meeting this problem. While this plan attracted a good deal of discussion, it did not meet with general approval. In the fourth Report, pages 37-41, and in the special report to Governor Fuller (House Document 1120 of 1928, reprinted also as Appendix A to the fourth Report), another plan was submitted and explained. This plan was not adopted by the legislature, but the discussion has been actively continued by a good many people since that time and various other plans have been suggested.

Under Resolves of 1929, Ch. 45, the Department of Public Works made a report, which appears as "Senate 5" of 1929. The department reported a bill, which appears at the end of that report, and the plan was prepared after study of the methods used in Detroit, Chicago, Kansas City, Los Angeles and San Francisco, and after conferences with police and court officials. This plan was not adopted, but may furnish the basis for further study.

The subject was again referred to from a different angle by the Judicial Council in its eighth Report, pages 39-40.

A draft bill was submitted which appears on page 40. Section 1 of this bill was to some extent covered by changes in the rules of the Probation Commission eliminating the requirement of reports of some of the minor violations referred to. The second and third sections, which could be considered separately, were not adopted by the legislature, but may be considered by your commission as calculated to some extent to reduce expenses as well as to bring about more substantial justice, as the second section in particular would tend to discourage criminal proceedings in the District Courts, the real object of which is not to protect the public through the enforcement of a criminal penalty, but is to secure a "criminal record" of the defendant for use in a civil proceeding for damages for the purpose of discrediting his testimony under the present statutory provision. This provision which allows a conviction for parking or inadvertently driving with a defective rear light or some similar thing, to be used subsequently in court as affecting the veracity of a person thus charged, seems sufficiently absurd as a matter of common sense to call for a change in the law.

In addition to the suggestions made by the Council and various other bodies and individuals, another method has been suggested which might accomplish the desired result of taking some of these matters out of the criminal law with the least possible change in the statutes. This plan is to develop the practice

permitted by G. L. Ch. 280, s. 1, and to provide that the courts may make such necessary rules for the prompt and convenient handling of these minor traffic violations as civil actions of tort for a penalty, instead of criminal prosecutions. The substance of Section 1 of Ch. 280 authorizing civil actions for the collection of money penalties in these minor matters is as old as Massachusetts. The proceeding used to be used by informers in the name of the commonwealth at a time when informers were entitled to part of the penalty. Since this practice of dividing the penalty with the informer was dropped, the use of the idea of a civil proceeding appears to have been forgotten. Its revival and adaptation to modern problems, particularly in the automobile field, may be worth your serious consideration. It might save a very considerable amount of expense and delay because it would take these minor offences out of the criminal side of the court, would avoid a criminal record for parking offences with its present standard of proof beyond a reasonable doubt, and would avoid the right of appeal for the Superior Court in such cases. The substitution of a civil penalty without its disagreeable consequences, which tend to encourage appeals, etc., might have a material effect upon the prompt disposition of such cases and avoid much attendance of police officers and waste of time of the judges as probably many such cases would be settled without contest by payment into the clerk's office.

This suggestion was discussed in the MASSACHUSETTS LAW QUARTERLY for February, 1933, on pp. 85-86. The draft act there suggested was in the form of an amendment, not of Ch. 280, but of Ch. 40. The draft was limited to petty motor vehicle cases but might well be applied to other violations of local ordinances the penalty for which is limited to a fine of \$20. I enclose copy of the pages containing this discussion and draft act with an explanatory note. As it is merely an optional method of procedure, I can not see that it would do any one any harm and it might prove to be a practical solution of a variety of problems.

I do not think that Mr. Flaherty's suggestion of turning all traffic violations over to the Registry of Motor Vehicles to be dealt with through the license without appeal is practically workable. The Register of Motor Vehicles today has, I think, unlimited power under the statute to suspend or revoke for any cause he sees fit subject to an appeal to the Board of Public Works; but the registry has enough to do with its present practice in the exercise of that power without taking on all these minor traffic violations, which, as shown by the eighth Report of the Judicial Council, page 69, amount to almost 9,000 in the Boston Municipal Court alone. There is such a thing as overloading the office of the Register of Motor Vehicles.

Coming now to the most recent plans suggested for economy and effectiveness, the subject of congestion and public expense was discussed at length in the eighth Report of the Judicial Council,

pages 8-17, and several suggestions were there made, which, if adopted, would tend to bring about a more businesslike condition of affairs. These suggestions begin on page 17. They were: first, an increased entry fee in the Superior Court (see p. 18); second, while the Council believed in keeping the District Court entry fee low, as compared with the Superior Court fee in order to encourage the use of the less expensive courts, they suggested that,

"If the legislature should decide to increase the entry fee in the district courts, we believe that it should be done by a plan of graduated entry fees, leaving the present fee of \$1 for all actions in which the amount claimed in the writ is \$500 or less, and providing that the entry fee for actions in which a larger sum is claimed shall be larger."

and third, a majority of the Council (Messrs. Mansfield and Thompson dissenting) also favored a jury fee. His Excellency the Governor, and the Joint Committee of last year which preceded your commission also recommended such fees and as you know, the Judiciary Committee of the legislature reported a bill for an increased entry fee, Senate 451, and a bill for a jury fee, Senate 452. I think these bills passed the Senate but were defeated in the House.

Fourth, the most far-reaching recommendation made by the Council in its eighth Report was the plan with the accompanying draft act, explained on pages 19-22,—a plan to amend the compulsory motor vehicle insurance law in the manner and for the reasons there explained.

Fifth, on page 36, a plan with a draft act as to venue in motor vehicle actions in the District Courts was submitted. This proposal was referred to by Judge Hibbard at your hearing the other day.

Sixth, on page 38, a plan as to the consolidation of actions brought in different counties was submitted. The substance of this bill, I think, was adopted as Ch. 247.

Seventh, on pages 40-41, the proposal for an appellate body of judges in the Boston Municipal Court for the summary review of sentences, etc., the act for which was submitted in the seventh Judicial Council Report, was renewed. This plan has already been referred to earlier in this letter.

Eighth, on pages 41-44, there is a plan with a draft act for waiving a grand jury indictment in criminal cases.

Ninth, on pages 44-46, a plan was suggested as to the law about attachment of wages by trustee process. The adoption of this proposal would, I believe, accomplish the double object of avoiding some expense and much injustice for reasons there stated.

Tenth, on pages 46-48, there is another suggestion for avoiding the abuse, and consequent expense in the use of the courts, of trustee process in general.

Turning now to the first report of your Committee on Public Expenditures (House 1250 of 1933), your report contained various recommendations as to fees and other details and a recommendation for an optional procedure in the District Courts for "the judicial arbitration of automobile cases" (see p. 54 and draft act on pp. 124-125). A similar recommendation was made by the special Commission on Motor Vehicle Insurance (Senate 280 of 1930, pp. 93-98). Such an optional procedure would not do any harm and might prove to be useful in practice. It is one of those harmless experiments, the value of which can not be ascertained except by trying it.

Your commission also suggested the possible abolition of the grand jury (see Report, pp. 57-58). Possibly the less radical step already referred to of permitting defendants to waive the grand jury might be worth trying while your committee is studying the larger problem. It could do no one any harm to authorize such a waiver because it would be optional with the defendant. There is nothing unconstitutional about the idea because it has already been decided in *Com. v. Rowe*, 257 Mass. 172, that the legislature may authorize a defendant to waive a jury trial. If he can waive his constitutional right to a jury trial, he certainly can waive the less-important right of being accused by a grand jury. The present requirement of a grand jury proceeding results from the judicial interpretation of Article XII of the Bill of Rights in the case of *Jones v. Robbins*, 8 Gray, 329,\* but there is nothing in that case to prevent the legislature from authorizing the waiver of the proceedings; whereas, abolition of the grand jury would seem to require a constitutional amendment even if it should be considered advisable.

I have listed in more or less chronological order the changes and suggested changes which involved the district court business during the past twenty years or so, thinking that it would be of assistance to your committee to see the gradual, but consistent, development of policy in regard to those courts from isolated tribunals operating under old-fashioned restrictions into a more elastic system of courts with greater freedom, greater powers and, consequently, greater responsibilities.

In the eighth Report of the Judicial Council at page 35 appears the following statement:

"All our judicial history is a picture of the growth of business crowding work downward toward the base of the judicial pyramid—common law trial work out of the Supreme into the Superior, and thence partly into the District Courts—equity out of the Supreme into the Superior and Probate and Land Courts—divorce into the Probate Courts—these are only instances of what has gone on and will almost inevitably continue. And this means that the baseline must

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\*See discussion in MASSACHUSETTS LAW QUARTERLY for August, 1921, p. 214.

be prepared to receive the load, and handle it satisfactorily or it will be squeezed sideways into administrative commissions."

As to the suggestion of "reorganization and consolidation" contained in the first paragraph of Senate 436 of 1933 (referred to your commission)—this seems to raise various questions, some of which may apply to the district court system throughout the state and some to particular districts only.

First, it would seem to raise the question of the consolidation of the Suffolk County Courts in the manner recommended and explained in 1912 by the special commission on those courts, already referred to (see House 1638 of 1912, pages 9-12, with draft act submitted on pages 54-63). This act was drawn after a careful study by that commission of what had been done in Chicago, Cleveland, Buffalo and elsewhere.

Second, as to the reorganization and consolidation of other district courts outside of Suffolk County, this subject was discussed by the Judicature Commission in its final Report (House 1205 of 1921, pages 33-37). On page 35, reference is made to certain recommendations made by a joint committee of 1892 in their report (Senate 31 of 1893, pages 11-12).

As to the matter of special justices practising in their own courts, to which objections were made at the hearing before your sub-committee, this subject was discussed by the Judicature Commission in its second Report, referred to, pages 52-53, and a draft act to prohibit such practice was recommended on page 144. The matter was again discussed by the Judicial Council in its third Report, pages 71-72. The council stated its belief that, "The whole practice should be stopped."

As to the pros and cons of the question whether the district courts should be reorganized as a whole on a circuit basis with full-time judges instead of part-time judges, I express no opinion at this time. The members of the Administrative Committee of the District Courts were in favor of the continuance of the present organization and were of the opinion that the weak spots in the present system could be gradually improved through the efforts of the Administrative Committee, and that all progress of that kind was necessarily gradual. It would be possible, of course, to deal with the matter in certain parts of the state without attempting to reorganize the entire district court system. The question of consolidating the Suffolk County Courts, for instance, on a circuit basis, as recommended by the Commission of 1912, could be dealt with independently of any question relating to the district courts as a whole. The experiments of such consolidation into a circuit system might perhaps be tried in Suffolk as an experiment, just as other experiments have been tried out there. Possibly there might be other portions of the state in which certain courts within a limited area easily travelled might be consolidated on some circuit basis.

I shall be glad if this letter proves to be of assistance to your committee by way of convenient reference to the history of the subject and if I may be of further assistance, kindly advise me. I have copies of a great many reports and discussions of some of these subjects here at my office, from which I may be able to supply your committee with information, in case you wish it, that is not covered by this letter.

I am writing this letter as an individual, rather than as Secretary of the Judicial Council, for, while it consists mainly of references to recommendations of the Judicature Commission, the Judicial Council and other bodies, where there is any expression of opinion not quoted from some other document, it is merely an expression of my own opinion for which the Judicial Council is in no way responsible.

The eight reports of the Judicial Council referred to are printed as Public Document No. 144 and are obtainable at the Public Document Room in the State House.

Yours very truly,

FRANK W. GRINNELL.

#### A PROPOSED REVIVAL OF CIVIL PROCEDURE TO ENFORCE "PRUDENTIAL" REGULATIONS.

*(A plan referred to in the foregoing letter and reprinted from the  
"Quarterly" for February, 1933.)*

House Bill 367 was introduced, on petition of the Mayor of Boston, to amend G. L. c. 90 by adding after Section 12 a new Section 12-a, that in all proceedings for the violation of parking rules

"Evidence that at the time of such violation the motor vehicle was registered in the name of the person so charged as owner shall be *prima facie* evidence that such person violated such ordinance, etc."

While the practical purpose of this proposal in the administration of the parking laws may be desirable, we do not think that such a statute should be passed in regard to a criminal proceeding, which is the present character of the proceedings for parking violations. The standard of proof in criminal proceedings is "proof beyond a reasonable doubt," and this standard should remain when a man is branded with a criminal record.

If the rule of proof is to be modified, as suggested in House 367, we believe the practice of prosecuting these cases should be changed to a civil proceeding such as has been provided for a century or more under section 1 of chapter 280 and that the modification of the rule should be applied to such civil proceedings and not to any criminal proceedings. This would relieve citizens of the criminal record and at the same time provide a simple method of administering the parking rules. The standard of proof in a civil proceeding is not "beyond a reasonable doubt," but is by "a preponderance of the evidence."

G. L. c. 262, s. 4, provides that no entry fee shall be paid in civil actions brought by the commonwealth. We see no reason why such a civil action for a penalty can not be heard and disposed of as it now is in the criminal sessions of the court if that is more convenient for the courts. Any rules of practice needed to make it convenient could be

readily prepared by the courts themselves as has been provided for in other statutes.

We think, perhaps, one reason why the civil suit has not been used as provided in Chapter 280, section 1, is that while the penalties provided for violation of city or town ordinances not in excess of \$20. are within the first line of Section 1 of Chapter 280, the statute authorizing town ordinances (G. L. c. 40, s. 21, applicable to cities by Chapter 39, Section 1) states that these penalties "may be recovered by indictment or on complaint before a district court . . . and shall inure to the town or to such uses as it may direct." There may be doubts in view of this language whether the broader language of Chapter 280, section 1, applies to these city or town ordinances. These doubts may be readily removed by inserting the words "or by an action of tort in the name of the commonwealth" after the word "complaint" in the seventh line of Section 21 of Chapter 40.

We submit the following as a basis for discussion. Perhaps Sections 1 and 3 would be worth trying whether Section 2 as to *prima facie* evidence is considered or not.

#### TENTATIVE REVISED DRAFT OF HOUSE 367.

**AN ACT** providing that Persons in Whose Names Motor Vehicles are Registered shall in Certain Cases be Liable if Such Vehicles are Parked in Violation of Ordinances, By-laws, Regulations or Rules pertaining thereto.

Section 1. Section 21 of Chapter forty of the General Laws is hereby amended by inserting after the word "complaint" in the seventh line thereof the words "or by an action of tort in the name of the commonwealth."

Section 2 said chapter is further amended by inserting after said Section 21 the following new section: Section 21A. In all actions of tort under the preceding section wherein a person is charged with the violation of any provision of an ordinance, by-law, regulation or rule, regulating the standing, stopping, or parking of motor vehicles upon any street, way, highway, road or parkway, evidence that at the time of such violation the motor vehicle was registered in the name of the person so charged as owner, shall be *prima facie* evidence that such person violated such ordinance, by-law, regulation or rule.

Section 3. The justices or a majority of them of all the district courts except the Municipal Court of the City of Boston shall make such uniform rules applicable to said courts and to trial justices and the justices of the Municipal Court of the City of Boston or a majority of them shall make such rules applicable to that Court as may be needed for the convenient administration of the jurisdiction of civil actions hereunder and providing a simple form of process therefor. Process in such actions may be served by any person qualified to serve civil or criminal process.

Section 4. This act shall take effect upon its passage as to the making of rules and on the                    day of                    as to the remainder.

#### NOTES.

1. The above amendment to G. L. c. 40 would automatically apply to cities by G. L. c. 39, s. 1.
2. G. L. c. 262, s. 4 now provides that no entry fee would be needed in such civil actions.
3. The provision as to service of process may be already covered by existing law and may therefore be unnecessary.
4. As to the nature of such civil suits under G. L. c. 280, s. 1, see *Bryant v. Rich's Grill*, 216 Mass. 344 at p. 349 and *Smith v. Look*, 108 Mass. 139.

F. W. G.

CERTAIN PROFESSIONAL RULINGS OF THE GENERAL COUNCIL OF THE ENGLISH BAR.

The following interesting rulings appear in the "Annual Statement of the General Council of the Bar" for 1932:

"J.P.'S PRACTISING.

"The following letter was addressed to the Council:—

'As a Justice of the Peace for \_\_\_\_\_ I have been complying with the rule regarding the refusal to take briefs in the county. This has involved me in some loss of professional work, not only in \_\_\_\_\_, but in other counties where briefs were available from the same solicitors.

I have now decided to adopt one or other of the following courses, and should be most grateful if you would be so kind as to tell me how far I should be complying with the rule of the Bar Council, which I am most anxious to observe.

1. To resign my office as a Justice and write to the Lord Chancellor accordingly, *or*
2. To become an "inactive" Justice and notify the Chairman of the Bench and Clerk to the Justices that I shall not sit on the Bench in future.

My inclination is to adopt the second course, and I should be glad to hear that you agree that I should be complying with the rule of the Bar Council.'

"The Council informed the barrister that the second alternative would not comply with the ruling in Annual Statement 1929, Page 13, and that 'at the time the ruling was made (following upon a long history of rulings in similar sense) it was felt that the position of Magistrates practising in those circumstances is so open to misrepresentation by ill-disposed persons that the rule must be absolute'."

THE PROPRIETIES OF LEGAL AUTOBIOGRAPHY.

"A barrister who had retired from practice asked whether in writing a book of Memoirs there would be any objection to the entry therein of a few interesting cases in which he had advised or acted as counsel.

"The Council replied that:—

"(a) A practising barrister ought not to write for publication about cases in which he is or has been engaged:

"(b) If the barrister has retired from practice the question is one for his own discretion, always remembering the confidences which have been reposed in him and the feelings of the persons concerned who were in the cases."

THE MOVEMENT FOR "INTEGRATION OF THE BAR"  
THROUGHOUT THE COUNTRY—REPORT OF SPECIAL  
COMMITTEE APPOINTED BY THE PRESIDENT.

*To the Members of the Executive Committee of the Massachusetts Bar Association:*

At the meeting of the Executive Committee on March, 1933, it was voted that a special committee of three be appointed by the President to consider and report on the movement current in other parts of the country for integrating the bar of the various states as an all-inclusive body in order that members of the Executive Committee and the association might be better informed as to the nature and possibilities of the movement. The President thereupon appointed the undersigned as members of this special committee.

The movement for an "integrated bar" which began to take form in 1918 has not hitherto gained much headway in the east, but, with the adoption of the idea by statute in eleven states and the vigorous support of various plans by the bar associations in ten other states, and the able and interesting suggestion made recently by the President of the Ohio State Bar Association as to the possibilities of adopting the idea without the disadvantages of legislative action, but with the co-operation of the judiciary, the movement is one which should be better understood by the members of the Massachusetts bar in order that they may consider what, if any, suggestions of value it may have which are capable of adaptation to our own local conditions and problems. This report contains no recommendation on the subject but merely gives information.

"Integration of the bar" means unification of the bar by a requirement that every lawyer admitted to practice shall become a member of a state bar organization which shall have powers of self-government under the supervision of the court and secure, through such unity and responsibility for its own character, the collective strength and value for the public service and the improvement of the profession which may be involved in such a unified organization. In the earlier stages of this movement, which developed largely through the discussions and reports at the annual Conferences of Bar Association Delegates, a vigorous controversy took place in New York where the movement was opposed by William D. Guthrie, Esq., then President of the Bar Association of the City of New

York. Mr. Guthrie carried it to the special meeting of bar association delegates in Washington in 1926, an account of which appears in the "American Bar Association Journal" for May, 1926, p. 320. After a vigorous discussion and reports from various states, Mr. Guthrie moved the following resolution,

*"Resolved*, that this Conference of Bar Association Delegates recommends to the various state and local bar associations throughout the United States that compulsory, all-inclusive incorporation of the bar is a matter that should primarily and properly be determined by each state, in accordance with its own existing conditions and its own traditions."

A motion to refer Mr. Guthrie's resolution to a committee with instructions to report it out for consideration at the July meeting was defeated by a vote of 47 to 34 and Mr. Guthrie's resolution was adopted, the seven Massachusetts delegates present being unanimous in its support. Since that time the somewhat dogmatic tone of the supporters of the movement, a tone which is a perfectly natural incident of genuine enthusiasts in the early stages of any movement of the kind, has been mollified and, perhaps for that reason, the interest in the movement has increased because of growing experience in various states with its merits and the growing dissatisfaction within and without the profession with conditions at the bar and with the lack of sufficiently effective forces to improve them.

The Committee on State Bar Integration, in its latest report to the Conference of Bar Association Delegates at Grand Rapids, Michigan, on August 28, 1933 (printed in the pamphlet containing the programs), after referring to the "interesting" and "most controversial" development during the past year of the experiment of reorganizing the whole subject of bar discipline in Illinois under the rule-making power of the Illinois Supreme Court, said,

"Your committee does not deem it to be within its province to recommend any one form of integration, or any one type of act as against another. In any state the route to integration and the extent of integration desirable, are problems which must be answered by the lawyers concerned and in the light of local conditions."

From the same report, it appears that the first draft of a statute on the subject was published by the American Judicature Society in its "Journal" for December, 1918, and that, beginning

with 1921, statutes, thus integrating the bar, were adopted as follows: North Dakota, 1921; Alabama and Idaho, 1923; New Mexico, 1925; California, 1927; Nevada, 1928; Oklahoma, 1929; Utah and South Dakota, 1931; Mississippi, 1932; Washington, North Carolina and Arizona, 1933. The Washington act, which is the shortest and one of the latest, is printed in full in the "Journal of the American Judicature Society" for February, 1933, with the exception of two amendments which were added by the legislature before it was adopted. It is reprinted at the end of this report as a sample statute. The largest and most active of these "state bars" is that in California, the activities of which appear in the "State Bar Journal," which is published monthly. The widespread and active interest which has developed as a result of this California organization is in striking contrast with the habitual inertia of the profession in most states.

In 1931, the Conference of Bar Association Delegates published a pamphlet containing the various bar acts up to that time and certain other proposed bar acts with annotations.

In addition to the adoption during the year 1933 of bar acts by three states already mentioned, bills to repeal such acts in South Dakota and Oklahoma were defeated with emphasis, and vigorous efforts were made to secure the passage of bar acts in: Missouri, Texas, Michigan, Oregon, Wyoming, Kansas, Indiana and Montana. A fourth attempt to secure such an act in Kentucky is planned for 1934 and it is stated that in "at least ten additional states committees are actively engaged in studying the subject."

In the same report, the committee

"... recommends that the Conference endeavor to arrange for the publication of a revised edition of Bar Acts Annotated with a digest of the decisions construing the bar acts; and that a survey of the work of the various integrated bars be made and the survey published in pamphlet form."

Accordingly, further information of the rather extraordinary history of this movement in the last five or six years may soon be available.

One of the objections which was raised during the controversy in New York to the proposal then and there discussed was that an all-inclusive bar association would wipe out of existence the older voluntary associations, such as the Association of the Bar of the City of New York with its record of public service and accumulated

property and power of developing the professional interest of its individual members. But, as we understand the experience in California, since that New York controversy, under the California Act of 1927, local voluntary bar associations have, not only continued to exist without interfering with state bar activities, but have been very vigorous in the public service, and this appears to have been notably true of the Los Angeles Association. Accordingly, while in some states some local bar associations might not continue their existence if a state bar organization were created, the all-inclusive state bar plan does not require any such result at all. This fact should be borne in mind in considering the problem in Massachusetts, because we do not believe that any of the older local associations in the various counties, such as the Bar Association of the City of Boston, the Middlesex Bar Association and others, would seriously consider with favour any plan which involved their annihilation.

The address of President Guinther to the Ohio State Bar Association last June has started a whole new line of thought as to the possibilities of the integration movement and because of this fact it is printed with this report for the information of the bar, in order to provoke discussion.

FRANK W. GRINNELL, *Chairman,*  
HORACE E. ALLEN,  
DANIEL W. LINCOLN.

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WASHINGTON'S SHORT BAR ACT—A SAMPLE OF STATUTORY  
“INTEGRATION”.

(From the *Journal of American Judicature Society* for February, 1933.)

Section 1. *Title of Act.* This act may be known and cited as the State Bar Act.

See 2. *Objects and Powers.* There is hereby created as an agency of the State, for the purpose and with the powers herein-after set forth, an association to be known as the Washington State Bar Association, hereinafter designated as the State Bar, which Association shall have a common seal and may sue and be sued, and which may, for the purpose of carrying into effect and promoting the objects of said Association, enter into contracts and acquire, hold, encumber and dispose of such real and personal property as is necessary thereto.

See 3. *First Members.* The first members of the Washington State Bar Association shall be all persons now entitled to practice law in this State.

See 4. *New Members.* After the organization of the State Bar, as herein provided, all persons who are admitted to practice in

accordance with the provisions of this act, except judges of courts of record, shall become by that fact active members of the State Bar.

See. 5. *Board of Governors.* There is hereby constituted a Board of Governors of the State Bar, which shall consist of the president of the State Bar, as an ex-officio member, and of one member elected by the active members residing in each congressional district now or hereafter existing in the state.\* The members of the Board of Governors shall hold office for three (3) years and until their successors are elected and qualified, provided, however, that the members of the Board of Governors elected to constitute the first board shall, at their first meeting so classify themselves by lot that two (2) members thereof shall hold office for one (1) year only and two others for two (2) years only and until their successors are elected and qualified. Vacancies in said Board of Governors shall be filled by the continuing members of the board until the next district election, held in accordance with the rules hereinafter provided for.

See. 6. *State Bar Governed by Board of Governors.* The State Bar shall be governed by the Board of Governors which shall be charged with the executive functions of the State Bar and the enforcement of the provisions of this act and all rules adopted in pursuance thereof. The members of the Board of Governors shall receive no salary by virtue of their office.

See. 7. *Powers of Governors.* The said Board of Governors shall have power, in its discretion, from time to time to adopt rules concerning membership and the classification thereof into active, inactive, and honorary members, the enrollment and privileges of membership, define the officers of the State Bar, the time, place and method of their selection, and their respective powers, duties and terms of office, annual and special meetings, the collection, the deposit, and the disbursement of the membership and admission fees, penalties, and all other funds, provide for the organization and government of districts and/or other local associations of the State Bar, and provide for all other matters, whether similar to the foregoing or not, affecting in any way whatsoever, the organization and functioning of the State Bar. Any such rule may be modified or rescinded by a majority vote of the active members present at any annual meeting of the State Bar after such notice as shall be prescribed by rule.

See. 8. *Admission and Disbarment.* The said Board of Governors shall likewise have power, in its discretion, from time to time to adopt rules, subject to the approval of the Supreme Court, fixing the qualifications, requirements and procedure for admission to the practice of law and, with such approval, to establish from time to time and enforce rules of professional conduct for all members of the State Bar and, with such approval, to appoint boards or committees to examine applicants for admission, and to investigate, prosecute and hear all causes involving discipline, disbarment, sus-

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\* Election by ballot by mail inserted by legislative amendment.

pension or reinstatement, and to make recommendations thereon to the Supreme Court and, with such approval, to prescribe rules establishing the procedure for the investigation and hearing of such matters, and establishing county or district agencies to assist therein to the extent provided by such rules, provided, however, that no person who shall have participated in the investigation or prosecution of any such cause shall sit as a member of any board or committee hearing the same.

Sec. 9. *Active Members' Fees.* The annual membership fee for active members shall be the sum of five dollars (\$5.00) payable on or before February first of each year, provided, that the membership fee for the year 1933 shall be payable not later than ninety days after the effective date of this act. The Board of Governors shall have power to increase such fee to a sum not exceeding ten dollars (\$10.00).

Sec. 10. *Inactive Members' Fees.* The annual membership fee for inactive members shall be the sum of two dollars (\$2.00), payable on or before the first day of February of each year, provided, that the membership fee for the year 1933 shall be payable not later than ninety days after the effective date of this act.

Sec. 11. *Admission Fees.* Applicants for admission to the bar upon accredited certificates or upon examination, not having been admitted to the bar in another state or territory, shall pay a fee of twenty-five dollars (\$25.00) and all other applicants a fee of fifty dollars (\$50.00).\*

Sec. 12. *Suspension for Non-Payment of Fees; Funds of State Bar.* Any member failing to pay any fees after the same become due, and after two (2) months' written notice of his delinquency, must be suspended from membership in the State Bar, but may be reinstated upon payment of accrued fees and such penalties as may be imposed by the Board of Governors, not exceeding double the amount of the delinquent fee.

Sec. 13. *Only Active Members May Practice Law.* No person shall practice law in this state subsequent to the first meeting of the State Bar unless he shall be an active member thereof as hereinbefore defined; provided, that a member of the bar in good standing in any other state or jurisdiction shall be entitled to appear in the courts of this state under such rules as the Board of Governors may prescribe.

Sec. 14. *Unlawful Practice a Misdemeanor.* Any person who, not being an active member of the State Bar, or who after he has been disbarred or while suspended from membership in the State Bar, as by this act provided, shall practice law, or hold himself out as entitled to practice law, shall be guilty of a misdemeanor; provided, however, nothing herein contained shall be held to in any way affect the power of the courts to grant injunctive relief or to punish as for contempt.

Sec. 15. *State Bar Commission.* Five (5) members of the bar

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\* Net proceeds for fees to be paid into state treasury by legislative amendment.

qualified for active membership in the State Bar, shall within ten (10) days after the effective date of this act, be appointed by the Chief Justice of the Supreme Court to constitute a commission which shall within ninety (90) days thereafter organize the State Bar, and take such steps and adopt such rules and regulations for the time being, as it may deem necessary to complete the organization thereof as herein provided, after which organization, the said commission shall be deemed abolished.

See 16. *Repeal.* All acts and parts of acts in conflict with this act, or with any rule adopted hereunder, are from the effective date of this act or of any such rule, hereby repealed.

See 17. *Legislative Intent.* If any section, subsection, sentence, clause or phrase of this act or of any rule adopted hereunder, is for any reason held to be unconstitutional, such decision shall not affect the validity of the remaining portions of this act nor of any other rule adopted hereunder. The legislature hereby declares that it would have passed this act, and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared unconstitutional.

#### INTEGRATION OF THE BAR THROUGH JUDICIAL ORDER.

ADDRESS BY PRESIDENT ROBERT GUINTHER OF AKRON.

*Delivered Before the 54th Annual Meeting of the Ohio State Bar Association, Cedar Point, Ohio, July 7, 1933.*

*(Slightly abbreviated by omission of some parts specially relating to Ohio.)*

I have chosen to explore the field of "Integration of the Bar Thru Judicial Order."

By "integration of the bar" is meant, of course, some process which reduces it to unity and makes every lawyer an integral part of a Bar Organization; procuring thereby all the strength and merit which inhere in every unified organization.

No one can serve for a year as president of the Ohio State Bar Association without coming to recognize some of the weaknesses attendant upon its purely voluntary character. No one can serve as its president and escape a feeling of pride concerning the effective work which it does; but he likewise must suffer the pain of consciousness of the many greater things which might be done if its organization were stronger, larger, and more effective. . . . The work of the association has come to mean something in the relation between the bar and the public. It does not yet mean enough. If, instead of being a voluntary association of a part of the lawyers of the state, the association were the unified organization of *all* the lawyers of the state, it could and would accomplish more of that public service which is its purpose and object. Unification of the bar of the state would bring to it the strength and power which would enable it to accomplish, for the public good, those aims and objects which now it cannot realize.

From the time when I first became a member of this association, efforts have been in process to cause a closer integration of the bar. The term "integration" is purely euphemistic. In plain, blunt speech "integration of the bar" means an organization of the bar which includes every person admitted to the practice of law; an organization in which every admitted lawyer is compelled to hold membership, and to which

he is required to pay dues; an organization which can perform disciplinary functions and remove offenders not only from its membership but from the right to practice law.

One of the commonest misconceptions in the mind of the layman is that our bar associations, local, state or national, are already of this character. The man on the street thinks that every lawyer is a member of the bar association; and that the bar association possesses full and complete powers of discipline, even to the extent of removal from the right to practice. Every one of us must have had some lay person comment to him concerning some alleged wrongdoing of a lawyer. Almost every one of such discussions ends up with a statement from the layman—"I don't understand why your bar association permits such a fellow to practice law."

There is, too, a popular impression that the bar associations have the power to regulate procedure in the courts, to make and change the rules of practice and the substantive law which sometimes seems to stand in the way of speedy determination of issues between litigants. The layman frequently inquires why it is that the bar association does not do away with what he considers red-tape, technicalities and procedural difficulties.

The layman, in short, attributes to the bar association a strength which it does not possess, and expects from it the exercise of powers which likewise it has never owned.

It is not alone the ordinary layman who labors under such a wrong conception of the character and power of the bar associations. Those who occupy high places have been equally in error.

When, then, President Hoover addressed the American Bar Association in Washington only last October, he said to it:

"Your court procedures are too unwieldy. One of the most disheartening difficulties of zealous officers of government is the law's delays, during which evidence loses its value, witnesses die, and criminals are encouraged to believe that through its maze of technicalities justice can be neither swift nor sure. You have a duty to simplify these procedures, to shorten these processes, to make the administration of law a terror to evildoers by its promptness and certainty."

"There is another field of urgent reform in the fields of justice—that is, the laws, the technicalities, the procedure, the cost of civil actions, of management of estates, of bankruptcies, and of receiverships. These laws and procedures have failed to keep pace with all the growing complexities of economic and business life, and they must be simplified that their costs and their economic wastes be reduced."

"A corollary duty, one that will hasten this end, is that *you* shall purge *your* profession of men unworthy of its trust. You occupy a position unlike that of other men, who may honorably pursue only their private gain. You are, besides that, quite specifically officers of government, sworn members of the courts in which you practice, and bound by oath to see not only that justice is done but that the laws are enforced. Too many men have been allowed to take this oath and then be false to it. They use the complexities of law and procedure, not to effect justice, but to defeat it. These men *you* must scourge from the temple which they profane. It is greatly to the credit of the American Bar Association that you have voluntarily accepted this duty, and are in constant process of cleansing the fountains of justice. But I urge a yet greater zeal in this undertaking, not only for the honor of your profession but for the welfare of the state."

It is a tribute indeed to the bar associations that laymen, great and small, believe them to be possessed of such strength and permitted to exercise such powers. Because of this belief of the laymen, even though mistaken, the bar associations are laid under a solemn duty to attempt to gain the strength and to attempt to exercise the powers.

In the administration of justice, two equally important elements are involved: one, the machinery and methods by which judicial proceedings

are carried on; and the other, the personnel which directs and controls the process. . . .

Efforts to revise the machinery of the law must not cease. The best machinery is useless, however, unless the operators are competent and responsible. The operators of legal machinery are, of course, lawyers. If the public is to enjoy satisfactory service from the lawyers the character and ability of the members of the profession must be kept at a high level.

The task of keeping the character and ability of the members of the profession at a high level is, I believe, genuinely a function of the profession itself, which can best be performed by a unification or integration of the bar.

Says Prof. Sunderland of the University of Michigan Law School, in a recent number of the *Tennessee Law Review*:

"There are two ways of dealing with the problem of personnel in any social group, *i. e.*, by internal and external control. If the first is to be employed, the members of the group must be closely associated, strongly organized and all must be held collectively responsible for the professional conduct of each. In dealing with individual violation of standards of behavior, the self interest of the group will furnish a strong inducement to maintain effective discipline within the organization. Only in that way can it hope to enjoy satisfactory relations with the public whose good-will is necessary to its own success."

"On the other hand, if the group is to be regulated and controlled from without, a strong organization within the group is undesirable. The public, acting through various governmental agencies, is less likely to meet successful resistance to its demands if it deals with individuals rather than with an organized association.

"This latter method has been almost exclusively employed in dealing with the legal profession as a social group. Organization among lawyers has been feared rather than encouraged. On the contrary, professional misconduct has been considered a wrong which the state itself, acting through the regular courts, should prosecute by direct proceedings against the offending individual. The bar as a group has had substantially nothing to do with the matter. This method of controlling the conduct of lawyers has never proved satisfactory."

The public, apparently, believes the bar associations have or ought to have the power of controlling the conduct of the members of the bar whether members of the association. I think the association should exercise this power, in part because the public believes that it has it. Such a power can be exercised only if all the lawyers in the state are "closely associated, strongly organized and all held collectively responsible for the professional conduct of each."

How can this close association, strong organization and collective responsibility be secured? The answer is, obviously, through an integration of the bar.

In Ohio we have been groping our way toward some kind of "All-Inclusive Bar." All of us can recall the debates between members of this association upon the subject of statutory organization of the bar. Some members of this association have been earnest advocates of statutory organization,—a corporation of the bar created by act of the legislature, of which all practicing lawyers must be a part. Others have been actively opposed. Bills for the incorporation of the bar have been proposed. No such legislation has been adopted in Ohio.

All of us know, of course, that the "All-Inclusive Bar" movement has made great progress in other states of the Union. Five years ago six states had statutory organizations—Alabama, Idaho, New Mexico, North Dakota, California and Nevada. All of them have retained their all-inclusive character, and reports from each of them give reason to believe that genuine public good has been accomplished. In the intervening five years, statutory organizations of all-inclusive bars have been perfected in a long roll of states—Oklahoma, Utah, South Dakota, Mis-

sissippi, Washington, Arizona, and North Carolina. During the winter just past, the legislation was adopted in several of the states named. In two states, Missouri and Oregon, proposals for the organization of the bar were rejected by the legislatures.

This is a remarkable story of progress. Surely the continuance in these states of compulsory organizations with extensive disciplinary powers must be taken to be evidence of the worth of such organizations. The constant increase in the number of states adopting the theory of compulsory membership in bar organizations is proof overwhelming that there is a strong forward movement in the United States for the establishment of a responsible, self-governing bar to which every lawyer must belong.

The same general plan is followed in all the organized bars. Power to disbar, suspend or reprimand is lodged in the bar itself. All lawyers engaged in practice are, of necessity, members of the organization and subject to its jurisdiction.

In California, for best example, the California State Bar chooses a Board of Governors. The Board of Governors is given power to disbar members, discipline them by reproof, public or private, or by suspension from practice, and has the power to pass upon applications for reinstatement. It may appoint local administrative committees, and delegate powers to them, dividing up the work so as to secure greatest dispatch. The local committees have power to receive and investigate complaints as to the conduct of members, to compel the attendance of witnesses, and to make findings and recommendations to the Board of Governors. Rules of Procedure are made by the Board of Governors, and its decisions are reviewable by the Supreme Court. The person under investigation is given the power to compel the attendance of witnesses and the right of examination and cross-examination.

Statistical information is available as to the first three and a half years of the activities of the organized bar of California. Almost three thousand complaints were filed, most of which were of insubstantial character, but, by reason of the investigation which was made, a great quantity of the criticism leveled against the bar as such was removed and many of the complainants were satisfied that their complaints were groundless. Seventy-nine of the complaints resulted in suspensions or disbarments. These seventy-nine disbarments and suspensions in three and a half years were three times as many as took place during the entire 77 years of history of the state prior to the state bar organization.

The conclusion seems irresistible that the bar can govern itself, and that when it is set to the task of cleaning its own house it proceeds with expedition in the performance of the task.

In Ohio, as we know, discipline of attorneys is a subject which is one for judicial recognition. Pursuant to Section 1707, General Code, either the Supreme Court, Court of Appeals or Common Pleas Court, may suspend or remove an attorney from office or administer reproof. Proceedings are to be instituted if knowledge comes to the court that the attorney may be guilty of any of the causes for suspension, removal or reprimand. The statute naively suggests that the knowledge of the judge may be brought into functioning power "by the bar association of the county in which such attorney practices".

Discipline, thus, is a judicial act, apparently performed by the judiciary by reason of a grant of authority from the legislature. The courts of Ohio have, however, refused to confess that their powers of discipline over attorneys are a creation of the legislature. They have, instead, said that such disciplinary powers are inherent in the judicial system itself and that the statutory provisions are merely "regulatory provisions recognizing already existing powers of the courts". The classic statements on the subject are those made in *In re Thatcher*, 80 O. S. 492, at 652, et seq.

There Judge Davis says: "Numerous authorities, English, federal and state, assert such jurisdiction (to disbar, etc.) as inherent in every

court of record as a necessary incident of its organization as a court, and that it especially, although not exclusively, results from the power to admit to the bar. \* \* \* The power to punish is not more completely involved in the constitution of the courts nor is it more necessary in the due administration of justice than is the power to see that none but persons of legal learning, integrity and respectful demeanor, and, generally speaking, of good moral character, shall be permitted to assume the functions of an attorney at law, and thereby, as officers of the court, assist in dispensing justice. By such sanction of the court an attorney is held out to the public as worthy of their confidence and respect. Hence, whenever it is made to appear to the court that an attorney is no longer worthy of the trust and confidence of the public and of the courts, it becomes not only the right but the duty of the court which made him one of its officers and gave him the privilege of ministering within its bar, to withdraw that privilege. Therefore, it is almost universally held that both the admission and the disbarment of attorneys are judicial acts, and that one is admitted to the bar and exercises his functions as an attorney, not as a matter of right but as a privilege conditioned on his own good behavior and the exercise of a just and sound judicial discretion by the court."

The judicial declarations subsequent to the *Thatcher case* have been equally emphatic in asserting the admission and discipline of attorneys to be subjects belonging exclusively to the court as a part of its inherent judicial power, and equally emphatic in denials that the legislature can, by enactments, enlarge or diminish the judicial power upon these subjects. The court has acknowledged that "regulatory provisions" may be enacted by the legislature, but has asserted that the legislative declarations are only expressions of a "method" to be regarded or disregarded by the court as it may think wise.

The declaration was most recently made in *State ex rel v. Albin*, 118 O. S., 529 at 533, where then Chief Justice Marshall spoke as follows: " \* \* \* A court does not operate automatically or perform its functions unaided. Attorneys and counselors are sworn officers of the court, so constituted by statute and defined by the common law as 'ministers of justice in aid of the court'. They are firmly established as indispensable units in our judicial system, without whose aid the courts could not successfully function.

"The relation between court and counsel is such that the court is required to repose almost unlimited confidence in counsel. Because of this close relation, and the necessity for honest and trustworthy attorneys and counselors, the legislature has given to them an official status, and has provided in Section 1698, General Code, that no one shall be permitted to practice as such unless admitted to the bar by order of the Supreme Court, or of two judges thereof. The same statute provides for examinations and empowers the Supreme Court to prescribe and publish rules to govern the same. Section 1698-1, General Code, declares it to be a misdemeanor for one not so licensed to represent himself as authorized to practice in this state. Sections 1700 and 1701 establish certain requirements as to moral character, education, citizenship, and other qualifications. These legislative requirements recognize the demands of special skill and special confidence, but were not intended to, nor do they, in fact, abolish the inherent power of the court to impose additional requirements governing admissions to practice, and rules have in fact been prescribed and published by this court which go far beyond the statutory requirements."

The Supreme Court of Ohio is not alone in its judgment upon the subject. Like declarations have been made by many courts of last resort. Only last year the Supreme Court of Massachusetts said, most emphatically:

"No statute can control the judicial department in the performance of its duty to decide who shall enjoy the privilege of practicing law."

In the course of its opinion, reported under the style of *In re Opinion*

*of Judges*, 180 N. E. 725, 81 A. L. R. 1059, the Massachusetts court calls the roll of decisions in other states of like character and effect. The quantity and number of the decisions establish beyond question that the legislature cannot deprive the courts of their inherent power to prescribe the condition which must be met by those who are officers of the courts.

Judge Cardozo, while yet a Justice of the New York Court of Appeals, wrote upon the subject in language characteristically strong and graceful, in *People v. Karlin*, 248 N. Y. 465, 60 A. L. R. 851.

From his wealth of reading, he was able to paint the picture of judicial power over practitioners of the law in the early English days. He put forth a multitude of citation, showing the exercise of the power even to the point where—

"The conduct of the barristers was regulated with minute particularity, even in matters so personal as the growth of their beards or the cut of their dress."

Developing the subject with the argument from history, reinforced by analogy and custom, he adopted over again the doctrine that—

"Membership in the bar is a privilege burdened with conditions", and concluded by saying—

"In the long run, the power now conceded will make for the health and honor of the profession and for the protection of the public. If the house is to be cleaned, it is for those who occupy and govern it rather than for strangers, to do the noisome work."

It is apparent, thus, that the courts of Ohio and elsewhere, properly assert their power over the two highly essential elements of a lawyer's life: his admission to practice, and his right to continue in practice. Power over these two elements is power over the whole of the life and living of the lawyer. It includes, of necessity, the power to determine proprieties of practice; to regulate the conduct of attorneys; to punish, as a contempt, persons not admitted to the bar who attempt to usurp, unlawfully, the function or office of an attorney. It includes the power to determine what constitutes the practice of law, and to deny to usurpers the right to continue in doing those things which constitute the practice of law. It includes the power to forbid those not admitted to the bar to perform acts and functions which are genuinely the practice of law, even though a legislative act may have pretended to confer on them the right to perform the acts.

If, then, the judicial power extends over a field which includes the admission, discipline or removal of attorneys, the regulation of their methods of practice, and the prohibition of the practice of law by others than attorneys, how can such judicial power be most effectively exercised?

To me, the answer is: By integrating the bar through a judicial order.

Such a judicial order would, of course, require that every person who desired to continue to practice law should be enrolled as a member of the integrated bar, which thus would be all-inclusive; that every person should be subject to regulations and codes of ethics which the court, would establish for the government of the members of the bar; that discipline for offenders should be administered by appropriate agencies within the organization itself, under the direction and supervision of, and in the manner directed by the court.

Just such things as these are attempted to be done by the bar organizations which are statutory corporations in the states which have adopted the theory of the all-inclusive bar. I, for one, question greatly whether, in Ohio, the legislature possesses the power to create a corporation of lawyers, requiring membership in the corporation as a condition precedent to the right to practice law. I question that, because I believe that the entire power over the subject of the practice of law resides in the courts and no part resides in the legislature.

If, however, the objectives of statutory bar organizations are desirable, those objectives can be attained in Ohio, without the necessity of begging the legislature to "enact a bill". A declaration of rule, or an

order by the Supreme Court will accomplish in Ohio the same results as have been accomplished in other states by enactments of their legislatures, and will have the advantage of flexibility not enjoyed in those other states.

If you ask for a specific program possible of adoption in Ohio, stating that you are interested in "specificities" instead of generalities, I outline the following to you:

Let the Supreme Court adopt rules requiring that every lawyer hereafter or now admitted to the bar, shall register annually either as an active or inactive member of the bar, active members to have privileges and rights to be spoken of in a moment, and inactive members to have no such privileges and rights except that of being reinstated as active members at any time. Lawyers who fail to register shall be completely removed from the roll of practitioners and have no rights as such. A registration fee shall be charged in an amount to be determined by the court and sufficient to make it possible for the work proposed to be done by the organized bar effectively to be carried on.

With the bar thus registered and enrolled, its organization becomes possible through the selection of a Bar Committee or Board of Governors, to consist, let us say, of nine active members of the bar. Let them be nominated by petitions signed by at least fifty members of the bar, no member being permitted to sign more than one petition. Let provision be made so that geographical considerations may be taken into account and, for example, let one member of the Board be chosen from each of the appellate districts. Let the election be made, after nominations, by the votes of the members of the bar generally, by having a ballot sent forward to each person who has registered or enrolled. Let the ballots be marked by each individual member and returned to an auditing agency to be named by the court, and after tabulation, let the election be certified by the court. Let this Bar Committee or Board of Governors, then choose officers of the bar and let it be the governing body of and have jurisdiction over the active members of the bar. So far as discipline goes, let the Bar Committee or Board of Governors, receive and consider complaints of improper conduct against any member of the bar, adopting as its standards of proper conduct the Canons of Ethics of the American Bar Association. Let it determine by appropriate rules, approved by the Supreme Court, the method and manner of service of process upon any member of the bar against whom complaint is made, appointing a time when, and a referee or special master before whom the evidence shall be taken, and giving to the complainant and the one complained of rights of subpoena, production of witnesses and documents and all things necessary to insure proper presentation of the two sides of the complaint. Let the report of the master or referee and of such members of the Bar Committee or Board of Governors, if any, as have participated in the hearing, be presented to the Committee or Board as a whole for determination by it of the discipline, if any, which shall be imposed upon the person charged with wrong-doing. Let provision be made whereby Grievance Committees of Local Bar Associations may conduct the hearings before the master and let the findings and conclusions of the Bar Committee or Board of Governors be subject to review by the Supreme Court of the state.

By some such process as this, organization of the bar can be accomplished in Ohio with the benefits and advantages which have accrued to bar organizations in the various states, and with avoidance of the chief arguments against all-inclusive bar organizations which have been raised in the large and populous states. In Illinois and New York, for example, proposals for all-inclusive statutory bars have been presented and found no reception. Those who were not already members of the voluntary bar organizations, objected to the compulsory feature of the all-inclusive bar organization. They feared, naturally, control of the organization by groups from the large cities. They knew that, by sheer weight of numbers, the lawyers of the cities could overbalance those

from town and country. They feared that the city groups, by reason of their numbers, and the large interests which they represented, might have especial power with the legislature, so that, either in the original bar organization bill, or in some amendment of it, the organization might be set up in such fashion as to be wholly controlled by groups from the cities. Some of the city lawyers were possessed of ideas just the converse, and feared that an anti-city sentiment might be roused up in the legislature which would then amend the bar organization bill so as to remove all city lawyer representation from its governing body.

Lawyers, whether from the city or the small town, were uniformly fearful of "political" influences. They recognized that legislatures, as such, are political bodies, responsible to the command or requests of political leaders. They reasoned that the legislature, the creator of the bar organization, if manipulated or urged by political leaders, might compel the bar organization to chart a course of expediency on the political seas under threat that the creator would, if displeased, kill or cripple that which it had created. They distrusted not the bar organization, but the source from which it was to spring.

They recognized, too, that a bar organization created by the legislature would be set in the mold fashioned by the legislature, and that no change could be made in the form of organization, or its method of operation, except with the consent of the legislature. They recognized that such an organization would be fixed, rigid and unyielding. They recognized that flexibility, not rigidity, was a quality highly to be desired in an organization of the bar.

If a legislative or statutory bar organization were proposed for Ohio, all of the objections which have been raised in New York and Illinois would have equal weight here. I am, myself, willing to confess that those objections are strong enough to have caused me to be "against" a statutory bar organization for Ohio. Almost every one of them, however, disappears as an objection to the organization of the bar through judicial order. The city bar will not become the dominant and the small-town bar the servient tenement in the organization which I suggest. The court will balance the numerical power of the city bar against the greater area served by the small town lawyer, by the requirement that selection of the governing body of the bar shall be determined, at least in part, by consideration of the geography of the state, and that at least one member from each appellate district shall be seated on the Bar Committee or Board of Governors. No one city can become all-powerful for in Ohio the large cities are in different appellate districts and each would be balanced against the other.

With the means of selection of the governing body of the bar directly in the hands of the lawyers themselves and with supervision thereof residing in the Supreme Court, the fear as to political influence is rather completely removed. I think it is fair to say that in Ohio there is genuine confidence in the integrity of the Supreme Court and the belief that it is not manipulated or controlled by political considerations or by any body or group. The exercise of its rightful supervision over the admission of members to the bar and their conduct while members, and the exercise of the right to suspend or remove from membership in the bar, would, in my opinion, be accepted by every citizen as proper and as a guarantee that the bar would be kept in hand through the exercise of the judicial function.

Flexibility of the organization would be assured if it were the creature of the court. If a change in the number upon the governing body seemed desirable; if a change in the method of selection were commonly thought wise; if a change in the length of time of service of officers and members of the governing body were suggested as practicable; such changes, any or all of them, could readily and quickly be accomplished by the court by the "adoption of a rule".

Those persons who have not heretofore been voluntary members of bar associations have, to a great degree, remained outside the organ-

ization because of their doubt of the strength of the organization and of its powers to accomplish. . . .

No one can doubt that a bar organization composed of all the lawyers of the state, with spokesmen claiming the right to speak for an organization of all the lawyers of the state, presenting a legislative program concurred in by them, would be far more effective before legislative committees and the legislature itself than is the present voluntary Ohio State Bar Association. . . .

Many lawyers, thus, who have remained aloof from the voluntary organizations, would find themselves in harmony with the strong and effective organization produced by having every member of the bar a part thereof.

Some lawyers, too, have remained outside the voluntary bar organizations because their methods of practice were not consistent with the practices of those in the organization. Little attention should be given to the objections of those persons. It goes almost without saying that they should be compelled to submit to discipline of an organization which is designed to create better and higher ideals of practice. If they are unable to conform to such better and higher ideals of practice, then a strong organization with power over them will be able to "purge" them from its ranks and thereby perform that service which President Hoover enjoined upon bar associations as such.

There are some, of course, who have refrained from becoming a part of the voluntary bar associations because of the element of expense involved therein. It seems quite unfair that those persons who become a part of a voluntary organization should bear the expense thereof and that the benefits to the bar as a whole, brought about by the voluntary organization, should be enjoyed by others without some contribution thereto. Such unfairnesses, however, prevail generally throughout life and can be corrected only by some compulsive power. The cost of membership in the Ohio State Bar Association is now eight dollars per year. For his eight dollars, the lawyer receives—first, the distinction of membership therein; second—the right to service of the organization's office in Columbus, called upon many times and oft by lawyers to their great advantage; and third, he receives the publication of the association, *The Ohio Bar*, bringing to him information concerning the activities of lawyers generally and of the association, and containing therein the official advance sheets of the Ohio Supreme Court reports and the Courts of Appeals reports. There are few lawyers who have become members of the association, who do not believe that they receive full value for the expenditure made by them. It is logical to expect that a lowered cost per member would be brought about if every lawyer of the state were a member. While the cost of carrying on the organization would be increased, the increase would not be in ratio and the cost per member probably would be decreased. In any event, fairness and justice require that every lawyer should make a contribution to carrying on the work of an organization which is designed to give benefits and advantages to him through improvement of the public opinion of the bar.

The Supreme Court properly requires that no one be allowed admission to the bar unless he has demonstrated that he possesses legal learning. It has now no means of assuring that a member of the profession shall continue to be possessed of legal learning. Probably no power will ever exist which can cause a practicing lawyer to know, after fifteen or twenty years of service, as much as he knew, or thought he knew, at the time he was admitted to practice. Some power, however, ought to exist which will permit the court to exercise some sort of an influence upon the mental life of the lawyer after he is in practice. Through a bar organization it can exercise that influence by seeing to it that he keeps himself equipped with the proper working tools of his profession—his books and magazines, and that he is supplied with information as to changes and growth in the law, whether by acts of the legislature or by decisions of the courts.

Every practicing lawyer ought, therefore, to pay his proportion of

the expenses of operating the state bar organization, because it will help to keep the *character* of the bar at a high level, and because, through it, some further advance can be made toward the goal of keeping the *ability* of the bar at a high level.

Conceding as I do, the existence of objections to an organized and all-inclusive bar, I nevertheless find the advantages of such an organization to weigh more heavily in the scales, if such an inclusive state bar comes into existence through co-operation between the bar and the Supreme Court and is the creation of the Supreme Court and subject to its supervision. The organized bar created by the Supreme Court can have just as much or just as little of autonomous self-government as may seem expedient to the Supreme Court. No powers can be seized for selfish interests by any individual members or group of members. The bar will be just as safe as the court. Fear as to its exercise of wrongful powers is unfounded for it will be only an agency of the Supreme Court for the administration of justice within the state.

Conceding, as we all must, that the Supreme Court alone has as one of its inherent powers, the right to admit persons to membership in the bar, and that as a further one of its inherent powers it has the right to remove them from the bar, it follows as a matter of course that it can place such conditions upon their continuance in practice as it desires within the realm of reason. Certainly one of such conditions may well be that the practitioner shall be a member of an organization, contributing to its support, with the design and end that the organization shall be an effective agency co-operating with the Supreme Court in the administration of justice throughout the state.

Such an organization permitting self-government of the members of the bar is, of course, of ancient origin in England. The Inns of Court perform for barristers the functions which I here suggest shall be performed by the organized bar under the direction of the Supreme Court. If a system is to be judged by its results, the self-government of the English bar must be considered entirely successful.

In the state of Illinois, rules have recently been adopted by its Supreme Court placing the responsibility for discipline squarely upon the bar organization, and giving it adequate power to support the responsibility, without, however, a requirement that every lawyer shall contribute to the expense of maintaining the bar organization. What I have suggested to you is a step beyond that yet taken in any state. I should be happy if I might see Ohio setting new stakes in the frontier-land of proper law administration.

In his address before the American Bar Association at Washington last October, then President Guy A. Thompson said:

"The bar in every state should have the power of self-government. Instead of the legislature's undertaking to prescribe the conditions of admission to the bar and seeking to determine the causes for discipline and disbarment, these matters should be handed over to the bar itself, with the power not only to refuse admission to applicants lacking in intellectual training or moral character, but also to scourge from its ranks the unscrupulous and unprofessional lawyer. The exercise of these powers by the bar should, of course, be subject to the control and final arbitration of the court. Then, and not until then, can the bar properly and justly be held responsible for harboring incompetent and dishonorable members. Furthermore, nothing will so stimulate professional pride, professional responsibility, and professional activity in the public interest as an all-inclusive and self-governing bar."

Let me quote again from Prof. Sunderland:

"The legal profession in the United States has been put in the absolutely unsound position of having to carry the responsibility for the misconduct of its undesirable members without having any power either to control their actions or to get rid of them. The responsibility cannot be avoided, for lawyers constitute so definite, distinctive and important a class and exercise privileges so clearly monopolistic in their character that the public has always assigned to them a claim of unity far beyond

what they actually possessed and has looked upon the bad conduct of one as more or less typical of the attitude of all. Since this seems to be inevitable the only reasonable and fair course for the people is to give the profession the power to carry that responsibility and then insist upon a high ethical standard of professional performance. All political experience indicates that it is futile to expect services of a public nature to be satisfactorily performed otherwise than by vesting adequate power in those chargeable with the character of the results. The movement of an integrated self-governing bar is in accord with that experience."

I believe that the profession in Ohio can carry its responsibility and can procure a high ethical standard of professional performance. Up until now it has not been permitted to do so because it did not have adequate power to secure such results. An integrated self-governing bar created by the Supreme Court, responsible to it and functioning through it, will, in my judgment, secure such results and bring about an administration of law and justice far superior to that now enjoyed by the people of the state of Ohio.

#### THE MOVEMENT TO REVIVE THE "CHILD LABOR" AMENDMENT.

*(Continued from page 29)*

But this federal impulse is quite different from a permanent grant of vague powers to more bureaucrats in Washington. Probably the number of lawyers, in Massachusetts, or in other states, who remember the phraseology of the proposed "child labor" amendment sufficiently to realize its scope, is a very small number indeed. Accordingly, we recall its exact phraseology to the minds of the Massachusetts bar for study.

#### THE TEXT OF THE SO-CALLED "CHILD LABOR" AMENDMENT SUBMITTED BY CONGRESS IN 1924 AND SUBMITTED BY THE MASSACHUSETTS LEGISLATURE FOR AN ADVISORY VOTE AT THE STATE ELECTION THAT YEAR WHICH RESULTED IN 247,221 FOR, AND 696,119 AGAINST, RATIFICATION.

"Section 1. The Congress shall have power to limit, regulate, and prohibit the labor of persons under eighteen years of age.

"Section 2. The power of the several States is unimpaired by this article except that the operation of State laws shall be suspended to the extent necessary to give effect to legislation enacted by the Congress."

The practical meaning of this "power to limit, regulate and prohibit" was discussed in the vigorous debate in the Massachusetts press in 1924 at the time of the advisory vote. Typical portions of this debate from both sides were reprinted in the QUARTERLY for July, 1924, page 15; August, 1924, page 52 and February, 1925, page 79, including contributions in favor of the amendment by Miss Ethel M. Johnson and Mr. Raymond G. Fuller, and arguments against it by Henry L. Shattuck and Joseph Lee. Mr. Lee's well-known interest in helping children adds peculiar force to his letter, which contained the following paragraph:

"The greatest objection, however, to national legislation upon the subject is that by lessening the responsibility of the States for dealing with the matter, it will inevitably weaken the effect of local agitation and the corresponding development of that local public sentiment upon which the effectiveness of all laws must ultimately depend. Without national legislation our laws regulating child labor in the several States have rapidly advanced. They will continue to do so if this amendment is not passed, and they will in that case retain the advantage of being effectively enforced. This amendment tends to dry up at their source the springs of public opinion from which, in the long run, progressive legislation must proceed." JOSEPH LEE."

*(Continued on page 88)*

## CHARLES SEDGWICK RACKEMANN.

1857-1933.

In the midst of all the discussion of sordid aspects of the profession, it is pleasant to call attention to the life of a man whose character and kindness and whose professional and public services were such as to command the respect and attract the affection of his colleagues at the bar, and entitle him to the gratitude of the community.

Early in the history of the MASSACHUSETTS LAW QUARTERLY, it was decided as a matter of policy to avoid obituary notices in general. This rule has been observed, but, like every rule, there have been occasional exceptions and very brief appreciations have been expressed of individuals or their portraits have been reproduced.

Charles S. Rackemann, who died a few months ago, occupied a position at the bar and in the affections of those who knew him and his work which deserves some record in these pages.

His family traditions of service were fixed at a high standard by his great-grandfather, Theodore Sedgwick, of Stockbridge, one of those vigorous men from Berkshire County who have contributed so much to the history of Massachusetts.\*

While he never held public office many of Charles Rackemann's services were of a public nature, and his life and career not only maintained but enhanced the family tradition.

F. W. G.

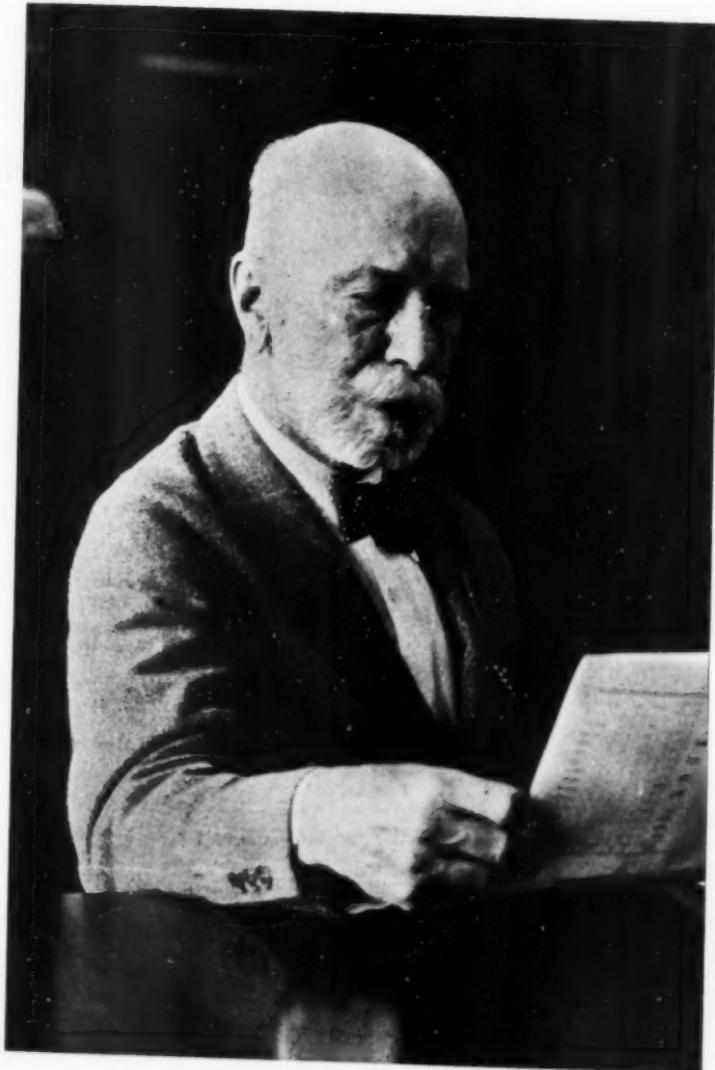
The following memorial was recently adopted by the Council of the Bar Association of the City of Boston:

## MEMORIAL OF THE BAR ASSOCIATION OF THE CITY OF BOSTON.

Charles Sedgwick Rackemann, for many years an honored member of the Boston Bar Association, died on the 29th of March, 1933, in his seventy-sixth year. Mr. Rackemann was a graduate of the Massachusetts Institute of Technology, studied law at the Boston University Law School and the Harvard Law School and held an honorary degree from Williams College. He began the

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\* Theodore Sedgwick, a delegate to the Continental Congress, a member of the Constitutional Convention which ratified the Constitution of the United States in 1788, speaker of the Massachusetts, and later also of the Federal, House of Representatives, United States Senator from Massachusetts, and finally an Associate Justice of the Supreme Judicial Court from 1802 to 1813.



CHARLES SEDGWICK RACKEMANN

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practice of law in Boston with the late Francis V. Balch under the firm name of Balch & Rackemann. The members of the firm were soon recognized as leaders in all matters having to do with real estate and trusts. Mr. Rackemann was deeply learned in those branches of the law, and was a careful and wise counsellor. Mr. Felix Rackemann joined the firm in 1888 and after the death of Mr. Balch, Judge James R. Dunbar resigned from the Superior Court bench and associated himself with the Rackemann brothers under the firm name of Dunbar & Rackemann. Mr. Rackemann was a member of the Council of the Boston Bar Association from 1921 to 1927 and represented the Association on various occasions. He was a member of the Committee appointed to bring about the construction of a new Court House in Boston, or additions to the present building. He did a vast amount of work in connection with this project, much of which will be availed of at some future time. He served as Vice-President of the Conveyancers Title Insurance Company during its early years; President of the Stamp Savings Society of Boston; Trustee of Public Reservations; President of the Abstract Club for many years, and President of the Constitutional Liberty League from its inception until his death. He was truly a public spirited citizen, and in everything pertaining to the welfare of the community was more than generous of his time and means. Nothing was ever too much trouble for him to undertake, if he felt that by so doing he was helping his town or his neighbors or his friends. He was always glad to be of assistance to younger and less experienced members of the bar and would freely give them advice and wise counsel with no thought of reward. He was kindness itself. He never by any chance failed to live up to the highest standards of professional ethics. He was always fair to those who for any reason might disagree with him or believe in a different interpretation of the law, and no one who ever came in contact with him went away with any feeling other than a friendly one. He was for many years a justly honored member of this association and it is fitting that at this time some record be made of the loss this association sustained in his death, and therefore the following resolution is offered.

**RESOLVED**, that in the death of Charles Sedgwick Rackemann the Boston Bar Association, of which he was for many years a distinguished member, has lost a greatly valued associate, an outstanding lawyer, a public spirited citizen and a friend looked up to and admired by all who had the good fortune to meet him, and further be it resolved, that a copy of this resolution be sent to the members of his family to evidence the sympathy which this association has for them in their bereavement.

**"DISCOVERY BEFORE TRIAL"—A REVIEW OF  
RAGLAND'S RECENT BOOK.**

In its Second and Final Report, issued in 1921, the Judicature Commission, after discussing fully the advisability of oral examination before trial, drafted and recommended\* an act providing that any party after the entry of a writ may examine orally any other party for the discovery of facts and documents admissible in evidence at the trial of the case.

The Special Commission to Study Compulsory Motor Vehicle Insurance appointed in 1929 also recommended an act\*\* giving the opportunity to either party to examine the other and witnesses orally after suit is brought and before trial.

The Committee on Law Reform of the Association of the Bar of the City of New York incorporated in its annual report for 1932-33 a proposal to extend the right of examination before trial so that any party may examine any witness on any relevant matter, combining the rights of discovery and inspection, with the safeguard that the courts be authorized to provide for secrecy of the examination in proper cases, and to punish disclosure of facts in these cases as a contempt of court.

Massachusetts, along with many other states, has gone part of the way along the path in allowing written interrogatories to be put to the parties only, before trial.

A half dozen jurisdictions have gone the full distance. Since 1858, Wisconsin has allowed full oral examination. Our neighbor, New Hampshire, has followed this practice since 1867. Other jurisdictions which exhibit a very liberal form of oral examination before trial are Indiana, Kentucky, Missouri, Nebraska, Ohio and Texas. Other states are swinging into line, Colorado by legislative act adopted only a few months ago, and Illinois in its new Civil Practice Act which goes into effect January 1, 1934.

The obviously increasing interest which the bar is taking generally in new methods of procedure, undoubtedly arising in part out of the increasing congestion of court dockets, and particularly in oral examination before trial, as exemplified by the very recent action in Colorado and Illinois, makes of special interest

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\* See Report reprinted in MASSACHUSETTS LAW QUARTERLY for January, 1921, pp. 107, 151-153.

\*\* See Report reprinted in MASSACHUSETTS LAW QUARTERLY for February, 1930, pp. 98-102.

at this time a full survey of the procedure by George Ragland, Jr., of the Chicago Bar, recently published by Callaghan and Company, under the title "Discovery Before Trial". The thoroughness with which Mr. Ragland has done his task is indicated by the fact that he did not confine himself to studying statutory and case law, but made field studies in fourteen jurisdictions "for the purpose of ascertaining the experience of the profession with each type of device which is being used". His presentation and conclusion, therefore, are a combination of scholarly research into the history, development and use in various forms of examination before trial, running from written interrogatories all the way to full oral examination, and a report on the practical workings of the plan as gleaned from his extensive field studies.

Many of Mr. Ragland's statements have a practical bearing which are worthy of the attention of the bar.

Here in Massachusetts, where the time between the entry of a case on the jury side of the Superior Court and trial is widening yearly, so that in Suffolk County, which receives annually about one-half of all the civil entries in the Superior Court, a jury case must sleep from three and one-half to four years before it can be tried, there is particular point in Mr. Ragland's statement that "Preservation as well as discovery of testimony is one of the important functions of pre-trial procedure."

It must be fairly obvious that a witness who is attempting to testify to an event four years old has in general only a cloudy recollection.

The bar, it is to be assumed, will be interested not so much in the theoretical aspects of the question as in its practical workings. Do the lawyers practising in jurisdictions having a liberal form of oral examination before trial like the practice? Mr. Ragland gives an affirmative answer.

"When first introduced there was considerable aversion on the part of the bar to the use of deposition procedure for purposes of discovery before trial. Such use of the procedure has been attacked as a 'fishing expedition' and as being foreign to the traditional purpose of deposition procedure. . . .

"This hostility on the part of the bar, however, is short-lived once the use of deposition procedure to discover and preserve evidence is given a fair trial. Its very reproach becomes its glory—the courts say that the virtue of the device is that it is a means of discovering evidence."

The author follows this with quotations from various court opinions, pp. 21, 22.

The field investigations disclosed that discovery is "used much more extensively in automobile accident litigation than in all other types of action combined," p. 27. Lawyers who specialize in representing plaintiffs in motor tort litigation welcome "the examination of their client if he has a good case because it enhances the possibility of an advantageous settlement," p. 34, and this is true in spite of the fact that defendants employ the process more frequently than plaintiffs.

However, "In fairness it should be said that the little prejudice toward discovery which was found in the fourteen jurisdictions which were visited, was confined to lawyers who specialize in representing plaintiffs," p. 35.

There is a chapter devoted to the cost of discovery examination,—a matter which naturally is of concern. Mr. Ragland's field studies show that the average cost per examination, excluding cost of copies, is "between ten dollars and fifteen dollars in the states wherein the ordinary deposition procedure is used," p. 171. Even this cost can be reduced, and frequently is, by using, by agreement of course, the stenographer of the examining lawyer.

The use of the record of the examination at the trial is the subject of another chapter. There are, according to Mr. Ragland, three different types of provisions as to use of the oral deposition. Some jurisdictions allow use by the taker only. Others allow use by either party. The third type of provision is that neither party may use the deposition unless the witness is unavailable for oral testimony, although the opponent of the party who produces the witness at the trial may use the deposition to contradict the witness; that the taker only may use the deposition of an adverse witness as evidence of an admission; and that either party may use it if the deponent is unavailable at the trial, p. 158.

Mr. Ragland also points out that discovery can advantageously be used in connection with summary judgment practice. After a defendant has filed his affidavit of defence, the court, upon application, could order an examination of the defendant, and upon the basis of that examination decide whether summary judgment should be rendered, p. 217. This is the practice in England, New Jersey and Michigan.

This review of "Discovery Before Trial" would be incomplete if it did not mention that Mr. Ragland presents adequately the

mechanics of the proceeding, including chapters devoted to persons from whom discovery may be had—time of discovery—initiating step in obtaining discovery—place of examination—general conduct of oral examination.

He also discusses examination by written interrogatories and demonstrates why that form of procedure can be only partially successful. Doubtless Massachusetts lawyers, knowing the meagre results commonly obtained from answers to written interrogatories, will agree with Mr. Ragland's conclusions.

The impression made upon the reviewer by Mr. Ragland's careful and temperate analysis of discovery procedure—in all its forms—makes assent imperative to the statement of Professor Edson R. Sunderland, in the "Foreword":

"It is probable that no procedural process offers greater opportunities for increasing the efficiency of the administration of justice than that of discovery before trial."

C.

#### "QUIETUS": A LOST PROBATE PRACTICE.

Until May 1, 1824, the compensation of Judges and Registers of Probate, both under the Colony and Commonwealth was secured to them by statutory fees. As early as 1692 (Province Laws 1692-3, Chap. 37) an Act providing for "fees for probate of wills granting administration, etc." contained this item:

"Every quietus four shillings."

In 1742-3, Chap. 5, the provision was:

"Every quietus to the Judge 1 shilling; to the Register 1 shilling."

This item appears in every Act, there are at least eight of them, until 1775-6, when the fee was reduced to nine pence; but in 1777-8, Chap. 17, it was put back to one shilling and so remained until 1795, Chap. 41, when it was changed to 20 cents each to the Judge and Register.

A "quietus" was a discharge and acquittance of an executor or administrator. The form appears in all editions of Freeman's "The Probate Auxiliary; Or, a Director and Assistant to Probate Courts, Executors, Administrators and Guardians, Being the Laws of the Commonwealth of Massachusetts, Respecting the Estates of Testators, Intestates and Wards." The first edition appeared in 1793, the last in 1812, and is as follows:

"Quietus.

Commonwealth of Massachusetts.

Cumberland ss. By the Honorable W. G. Esq. Judge of the Probate of Wills, etc., for said County of C.....

(L. S.)

C. D. Executor of the last Will and Testament (or Administrator on the Estate) of A. B. late of ..... Deceased, having fully administered upon all the Estate of said Deceased that hath come to his hands agreeably to the Inventory thereof, recorded in the Probate Office for the said County of C..... and accounted for the same agreeably to Law, as by the Record in said Office, will appear.

I do therefore decree that he be and he is hereby from henceforth acquitted and discharged of the same.

Given under my hand and Seal of Office this ..... day of ..... A. D. 17 .

W..... G.....  
ME."

For more than a century and a half, therefore, there was statutory recognition of this practice. What has become of it? So far as I can discover, it was never abolished by statute or decree of the Supreme Judicial Court. I find but one reference to it by that Court. In 1885 in the case of *White v. Ditson*, 140 Mass. 351 at 355, the Court refers to it as a "process known in Rhode Island." Apparently the Court was entirely ignorant that it was a practice of the Probate Courts under the Colony and Commonwealth and recognized by statute to 1824.

Apparently the allowance of accounts in the early days of the Probate Court was somewhat informal. As it became more formal and a decree allowing an account was entered upon petition, one may surmise that this latter decree came to be looked upon as the equivalent of a quietus. There has followed the confusion between a decree allowing an account and a decree finally adjudicating the items thereof. This confusion would be avoided by a return to the early practice and such early practice might be an answer to the excellent article of Oliver Prescott in 7 Harvard Law Review 32, in which he points out as a serious defect in the Massachusetts probate system the inability of an executor to get the protection which a decree of distribution gives to an administrator. Perhaps some legal antiquarian can discover more definitely when and why this ancient practice fell into disuse.

T. H. GAGE.

Worcester, Mass.

**STILL MORE ABOUT THE JUDICIAL COUNCIL IDEA AND  
THE FEDERAL COURTS—THIRD REPORT TO  
CONFERENCE OF BAR DELEGATES.\*  
(AUGUST 28, 1933.)**

**REPORT OF THE COMMITTEE ON RULE-MAKING POWER AND JUDICIAL  
COUNCILS.**

*To the Conference of Bar Association Delegates:*

The plan suggested by this committee and explained in its last two reports, to bring about co-operation between the bar and the National Conference of Senior Circuit Judges through the medium of committees of members of the bar in the various federal circuits or districts selected by the presidents of state bar associations and the local federal judges, appears to be gradually coming into practical operation. There have been various meetings of local committees as well as some meetings of the committees with federal judges for discussion, one of which took place in Asheville, North Carolina, on June twelfth.

Messrs. Pogue and Seasongood of Cincinnati, and Mr. Hengst of Columbus, Ohio, were appointed a committee for the Southern District of Ohio by the President of the Ohio State Bar Association. After meeting with Judge Moorman, the senior circuit judge, a letter was sent to all the members of similar committees in other districts of the circuit asking for suggestions. The plan was that the suggestions should not be made individually but should be considered by each local committee before being submitted to the other committees. As the time was somewhat short, however, the suggestions received were mimeographed and sent to all members of the various committees in the circuit. These suggestions were to be considered at a meeting in Cincinnati with Judge Moorman and some of the other circuit judges on June 29, 1933.

The committee for the District of Massachusetts† in the First Circuit has had a number of suggestions made to it and expects to consider these during the summer and to discuss some of them with the district judges. Copies of the suggestions made in Ohio have also been submitted to the Massachusetts committee for their consideration. Gradually some plan for an interchange of ideas between committees in different circuits may develop.

In view of the repeated requests by the National Conference of Circuit Judges as expressed in the reports of Chief Justice Hughes referred to in our previous reports and printed in the AMERICAN BAR ASSOCIATION JOURNAL for December, 1932, at page

\* The previous reports on this subject were reprinted in MASSACHUSETTS LAW QUARTERLY for August, 1931, p. 7 and February, 1933, p. 54.

† The Massachusetts committee consists of Fitz-Henry Smith, Jr., J. Lewis Stackpole and John V. Spalding.

824, the committee again calls the attention of the bench and the bar to the importance of seriously considering this plan in the various districts in order that members of the federal bar may become more articulate in connection with the future development of federal practice and procedure. As time goes on with the changing conditions in the community and the increasing problems of public expense and convenience, the development of this co-operative work on both sides of the bench will, as suggested in our previous reports, become more and more important.

Reports received from presidents of the various state bar associations indicate the growing interest in the study and practical development of the rule-making powers of the courts in some states and of the growing exercise of existing rule-making powers in other states. Among the outstanding illustrations of this during the past year is the entire reorganization by rule of the Supreme Court of Illinois of the whole subject of disciplinary procedure and administration. This action is described in outline in the editorial in the *AMERICAN BAR ASSOCIATION JOURNAL* for June, 1933, page 338. Any one desiring further details of the plan adopted may obtain them from the very effective Secretary of the Illinois State Bar Association, Mr. R. Allan Stephens, Springfield, Illinois.

Another interesting development of 1933 appears in the following statute passed by the legislature of New Mexico.

**SECTION 1.** The Supreme Court of the State of New Mexico shall, by rules promulgated by it from time to time, regulate pleading, practice and procedure in judicial proceedings in all courts of New Mexico, for the purpose of simplifying the same and of promoting the speedy determination of litigation upon its merits. Such rules shall not abridge, enlarge or modify the substantive rights of any litigant. The Supreme Court shall cause such rules to be printed and distributed to all members of the Bar of the State of New Mexico and to all applicants, and the same shall not become effective until thirty days after they have been so printed, made ready for distribution and so distributed.

**SEC. 2.** All statutes relating to pleading, practice and procedure, now existing, shall, from and after the passage of this act, have force and effect only as rules of court and shall remain in effect unless and until modified or suspended by rules promulgated pursuant hereto.

The passage of this statute was followed by the appointment by the Chief Justice of the Supreme Judicial Court of a committee of lawyers to serve in an advisory capacity and in the meantime the court promulgated the following rule under the statute:

All now existing statutes relating to pleading, practice and procedure in judicial proceedings in all courts of New Mexico, shall, from and after the taking effect of the act of the eleventh legislature, approved March 13, 1933, known as Senate Bill No. 130, remain in effect and have full force and operation as rules of court, unless and until otherwise ordered.

A somewhat similar statute was submitted to the legislature of Indiana on behalf of the Indiana State Bar Association and was favorably reported by legislative committees, but was defeated. The form of the proposed Indiana bill appears in a footnote.\* A bill for a judicial council was also submitted to the legislature in Indiana, but was defeated. The subject is still under consideration.

In Kentucky, an effort was made to secure passage of the integrated bar plan, but it failed in the Senate.

The integrated bar plan was adopted for Arizona by legislation in March of this year to take effect on June fourteenth.

The Judicial Council of Rhode Island, created a few years ago, has taken an active interest in its work and with the result, among others, of the general revamping of the rules of the various courts.

The plan for the adoption of a judicial council in Georgia, submitted by the Georgia Bar Association, was actively supported before the legislature, but did not pass. The movement for such a council will be renewed before the 1934 legislature.

In the State of Washington, the following account, received from Alfred J. Scheweppe, Executive Secretary of the Judicial Council, states fully the developments in that state.

In the State of Washington the 1925 Legislature, in two separate acts, created a judicial council (Chap. 45, Laws of 1925), and also conferred upon the Supreme Court complete rule-making power in civil and criminal proceedings (Chap. 118, Laws of 1925).

Since its creation in 1925, the judicial council has addressed itself to various problems relating to the judiciary,

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\* BILL OF THE INDIANA STATE BAR ASSOCIATION.

A BILL FOR AN ACT RELATING TO PROCEDURE IN THE COURTS OF THIS STATE; CONFERRING POWERS UPON THE SUPREME COURT TO MAKE, PRESCRIBE, ENFORCE, AND PROMULGATE RULES AND REGULATIONS IN REGARD THERETO; AND REPEALING ALL LAWS IN CONFLICT THEREWITH.

*Be it enacted by the General Assembly of the State of Indiana:*

SECTION 1. All statutes relating to procedure in any of the courts of this state shall hereafter have force and effect only as rules of court, and shall remain in effect unless and until modified or rescinded by rule or rules made pursuant hereto. The Supreme Court, by a majority vote thereof, shall have the power from time to time to adopt, modify or rescind any rule of court. All rules of court so adopted, and all those modifying or rescinding any former rule shall be promulgated under such rules as the Supreme Court shall adopt.

SEC. 2. Other courts of the state shall have the power to establish rules for their own government, supplementary to and not conflicting with the rules prescribed by the Supreme Court.

SEC. 3. All laws or parts of laws inconsistent with this act are hereby repealed.

including a survey of the judicial business of the state, and has formulated a number of rules of practice, which the Supreme Court, under its rule-making power, has adopted. The council has acted as a clearing house for suggested changes in procedure by the entire Bar of the state, and, after investigation and study, has formulated such rules as were deemed by it advisable and has recommended them to the Supreme Court for adoption. In fulfilling this function, the judicial council has really been the medium whereby the rule-making power has been rendered effective, because the Supreme Court itself would not have time for the necessary research and draftsmanship. That this is true is demonstrated by the fact that in a number of states where the rule-making power has existed for many years, it has never been exercised, simply because there was no advisory body which prepared the necessary changes in rules, for adoption by the appellate court.

The rules of practice formulated by the judicial council and adopted by the Supreme Court are set forth in Volume 159, Washington, pp. lvii to lxx. Under the rule-making act these rules of practice supersede any conflicting procedural statute.

The judicial council in this state has had a biennial appropriation ranging from \$4,000 to \$6,000, which has been sufficient to pay the actual expenses of the members of the council and a very moderate amount of clerical assistance. Meetings have been held from ten to twelve times a year and have been productive of very good results. The opposition which existed to the council, on the part of many members of the Bar in the beginning, has very considerably subsided because of the carefully considered work that the council has done to date. Owing to the heavy drop in state revenues, the 1933 Legislature has provided an appropriation of only \$4,000; but even this moderate amount will enable the council to do some useful work.

A summary of the activities of the judicial councils and of their reports in various other states appears in the "Journal of the American Judicature Society" for June, 1933.

One of the most vigorous recent discussions of the rule-making power of the court as a power independent of legislative dictation appears in the majority opinions in the case of *Kolkman vs. the People*, which was decided on May 11, 1931, and is reported in 89 Col. 8 (3 Pac. Rep. 575). The case is discussed by Professor McCormack, of Northwestern University Law School in the "Journal of the American Judicature Society" for February, 1933, pages 151-154.

Space will not permit a detailed account of the activities in every state, but the foregoing information will serve to illustrate

the marked trend of professional thinking in different parts of the country in the direction of a closer and more effective study of the administrative functions and responsibilities of members of the profession on both sides of the bench in performing that part of the work of the government which naturally falls to the judiciary under our system.

The powers involved are sometimes referred to as "inherent" powers of the courts and we have heard the word "inherent" objected to by some lawyers in conversation.\* We think the conception of the powers, or more exactly the duties, of courts in this connection may be more clearly understood if, instead of using the word "inherent" we consider the powers involved as merely incidental to the duties as a matter of common sense administration of the judicial business of the state, and that the reasonable regulation of how the business of courts is to be done is as natural a part of the judicial function, with the co-operation of the bar, as the actual decision of cases.

In these days when every variety of bureau or department is being created in this country with almost unlimited power of regulation, it would be strange if a closer study of the nature of the great Judicial Department in our system of government did not result in recognition of regulatory powers adequate to the proper performance of the great duties imposed upon it—duties which the American people expect the courts and not the legislatures to perform.

Respectfully submitted,

FRANK W. GRINNELL, *Chairman.*  
JOHN D. BLACK (Chicago).  
MURRAY SEASONGOOD (Cincinnati).

#### NOTE.

The Act of Congress providing for rules of criminal practice and procedure to be made by the Supreme Court of the United States appears on page 80 of this number.

\* Since this report was published Mr. Charles A. Beardsley of California has expressed his views in the "American Bar Association Journal" for September, 1933.

## HENRY AND JOHN FIELDING AS PIONEER LAW REFORMERS.

(*Current problems both judicial and legislative as to crime, liquor, police, judicial character and standards of administration, lend peculiar interest, both for the lawyer and the layman, to the recent little volume by B. M. Jones, Esq., of the "Middle Temple, Barrister at Law" on "Henry Fielding, Novelist and Magistrate," published by Allen and Unwin. Probably few persons and especially few lawyers, unless they have read the extended and carefully prepared biography of Fielding in three volumes which was published in 1918 by Governor Cross of Connecticut, have any conception of Fielding's legal career. As Mr. Justice Duparcq says in his foreword to the book of Mr. Jones "many have deserted the law for literature but few men have served both as faithfully as Fielding, in his short life, contrived to do. Mr. Jones has done a real service by collecting with painstaking and scrupulous care all that is known of the life of Fielding, the lawyer and the magistrate." An extended and readable review of this book by Mr. Desmond MacCarthy appeared in the London Sunday Times of July 23, 1933, which is reprinted below. A brief reference to Sir John Fielding is added at the end.)*

### A REVIEW OF "HENRY FIELDING, NOVELIST AND MAGISTRATE".

By B. M. JONES. (Allen and Unwin. 8s. 6d.)

BY DESMOND MACCARTHY.

(From the London "Sunday Times" of July 23, 1933.)

Austin Dobson's fine monograph on Fielding dealt chiefly with the novelist. He touched on Fielding the magistrate and reformer, but his book did not prove that Fielding has as good a right to be considered "the Father of the English Magistracy"—and the founder of Scotland Yard—as to be called "the Father of the English novel": to show that is the purpose of this short, interesting, unpretentious, satisfactory book.

Fielding could not foresee that his novels would take a permanent place in the literature of his country; or that future legislation would follow some of his measures for dealing with crime and making London safe for its citizens. But he felt that his example as a Bow Street magistrate was quite as important to his country as his fiction. He was not a writer who believed that the point of life is to provide material for good novels; life was something to be lived, and if possible improved—an end toward which authors might contribute. Naturally, if you wrote at all, you ought to write like a scholar and an expert and a gentleman, but like



HENRY FIELDING  
(*The Portrait* by Hogarth)



SIR JOHN FIELDING

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many masters of the art of fiction Fielding was a man of the world and what those of another school would consider a Philistine. "Amelia" is as full of exposures of the law and pleas for prison reform as "Bleak House" or "Little Dorrit," while "Tom Jones" contains as large a proportion of moral generalities as the novels of H. G. Wells.

#### THE ILL-FAME OF MAGISTRATES.

The life of Fielding falls into three divisions. In 1737 his successful career as a dramatist (his comedies were levelled, like Bernard Shaw's, at current abuses and absurdities) was ended by the passing of the Licensing Act, intended to silence his political satire. From that year to 1749 he studied law, practised at the bar and wrote all but one of his novels. He also edited three papers in which he continued the attacks he could no longer make from the stage. From 1749 to his death in 1754 his work as a magistrate and his pamphlets and articles on legal and social evils occupied his energies and used up the last of his tired strength. They attracted great attention and opened the way to the reform of the Criminal Law and its administration. Mr. B. M. Jones gives an interesting account of these activities and of their importance to posterity.

One surprise for most readers will be the discovery that when Fielding took up the duties of Justice of the Peace, the post had a disreputable name. All magistrates were then unpaid; they earned a living by taking fees from those charged before them. They were commonly known as "trading justices," and most of them made no scruple in creating business for their own emolument, and in regarding the administration of justice in no other light than as a commodity in the vending of which they could make money. They appear to have been "with few exceptions men of profligate lives, ignorant, mean, needy, and rapacious." There was a Justice Blackborough at Clerkenwell whose method was to issue warrants and take-up all the poor devils in the streets and bail them for 2s. 4d. apiece. The proceeds went into his pocket; and by arresting, say, a hundred street-walkers, he could make close on £12. He did not jail them because bail was more profitable. . . . In "Amelia" there is a damaging picture of a Justice of the Peace in the person of Mr. Thrasher; the justicee he administered, says Fielding, was never indifferent, but when he could get nothing on either side.

Custom permitted the magistrate to prepare for a client, as a barrister, a case which was about to be tried before him, and Fielding's enemies accused him of using his position to get business for himself. The other surprise in store for some readers is the virulent scurrility—and the number—of the enemies so magnanimous and convivial a man met in his path. Behind the abuse the twittering jealously of his rival is audible, who thought him so

dreadfully coarse—Richardson; the smallest mind that ever produced memorable work.

#### CRIME IN LONDON.

Mr. Jones also by quotations (as was done above) suggests the disorder and danger of the London streets in those days. People were knocked down and robbed, and sometimes murdered at their doors; highwaymen infested the principal routes to the city. Horace Walpole, in one of his letters, describes himself watching from his own window an attack on a post-chaise by a highwayman in Piccadilly; in another he says, “One is forced to travel even at noon as if one were going into battle.” Now, the work that Fielding did as a magistrate was to devise some rough-and-ready ways of mitigating this intolerable state of affairs.

He set before himself three objects: (1) To form a force of men acting under his directions, strong enough and clever enough to apprehend individual felons immediately after receiving information of the commission of a crime. (2) To break up the nests and retreats of criminals and leave them no place of refuge. (3) To awaken the public conscience to the underlying evils which caused men to betake themselves to crime, and to indicate to the legislators some means of removing those causes.

Once during his magistracy five murders were committed in Westminster by street robbers in a single week. The Privy Council’s notion of dealing with such crimes was to offer large rewards to informers, which cost many thousands a year, and led, as Fielding’s experience showed, to traffic in blood money and dastardly perjuries. This was the system on which such monsters as Jonathan Wild battened, who increased his profits as a receiver of stolen goods and terrorised his bandits by informing. Fielding asked for £600 to pay some stalwart and intelligent men to supplement the wretched old watchmen with their long poles, who dared not, and could not, apprehend anybody. The result was that within a few days of receiving £200 that particular gang of cut-throats was dispersed; seven were taken, the rest driven either out of the town or the kingdom.

#### FIELDING’S REMEDIES.

The other methods which he used were: (1) making his own house and Bow Street, where in his absence a deputy took his place, depots for lodging information concerning robberies; (2) impressing the public by advertisement with the necessity of giving prompt information; (3) keeping two pursuers on horseback at Bow Street, and also a register there of all lost goods and of the names of suspected persons as well: this was the seed from which Scotland Yard grew. He also succeeded in persuading the Privy Council to pay him an allowance, thus making him independent of extracting money out of the administration of justice:

this was the beginning of the stipendiary system in England. It may also be claimed for Fielding that he was the first to convince the legislature of the desirability of paying witnesses for their time, and of some system analogous to that of the modern Director of Public Prosecutions. His pamphlets and articles on the causes of crime—on the deluge of gin, the beastly housing conditions, the tyranny of bailiffs, the extortionate cruelty of jailors, the hideous mockery of so-called “houses of correction,” the noisome condition of prisons, the disgrace of orgiastic public executions, began to start in the governing class misgivings that something would have to be done some day. He even succeeded in inducing some members of Parliament to peep trembling into Westminster’s horrible rookeries. In his “Enquiry” he wrote that “the stench arising from the prisoners is so intolerable that it is difficult to get any gentleman to attend the Court at that time”; and in 1750 forty persons, including six judges, died through catching jail fever from the accused at the Old Bailey.

It is clear that Fielding, in spite of the risk, had inspected some prisons himself, and, Mr. Jones says, that he did something to prepare for the success of Howard and other reformers in the last quarter of the century. The jails were carried on as private profit-making concerns, and a man hard enough to make a good thing of his opportunities was ready to pay as much as £5,000 for the wardenship of the Fleet.

#### HIS NATURE AND HIS MORALITY.

When Fielding was composing his “Proposals for the Poor,” he wrote that what had induced him to undertake it was “the pleasure of thinking that, in the decline of my health and life, I have conferred a great and lasting benefit on my country.” He did not get much pleasure afterwards from dwelling on that thought; I doubt if he dwelt on it. The impulse to find remedies for misery came spontaneously from his sympathetic nature and his indignation. To high-minded moralists Fielding has always seemed insultingly indulgent to human-nature; he did not ask much from it; it did not ruin handsome high-spirited Tom in his eyes that Tom had been kept for a while by Lady Bellaston.

Fielding was prepared to see most sins, weaknesses and meannesses in a comic light. But he knew there was a brute in man, a hellish capacity for callousness, and *that*—and its results, he could not stand. He saw those results round him, and he caught a last glimpse of “that malevolence of which at birth we partake in common with the savage creatures” on his voyage to Lisbon; when the watermen and loafers of Rotherhithe mocked him as he was carried to the boat—emaciated, panting, his belly swollen with dropsy, and with death so visible in his face that a woman with child turned away from him. I recommend those who would understand why Fielding wrote so masterfully and well to read, first,

this book—for it shows the nature behind his style; and then, that journal of a dying man, "A Voyage to Lisbon," a dying man who enjoys every moment that can still be enjoyed, forgives everything that can be forgiven, laughs at everything that can be laughed at, and bears with magnanimity what is almost intolerable.

#### SUPPLEMENTARY NOTE.

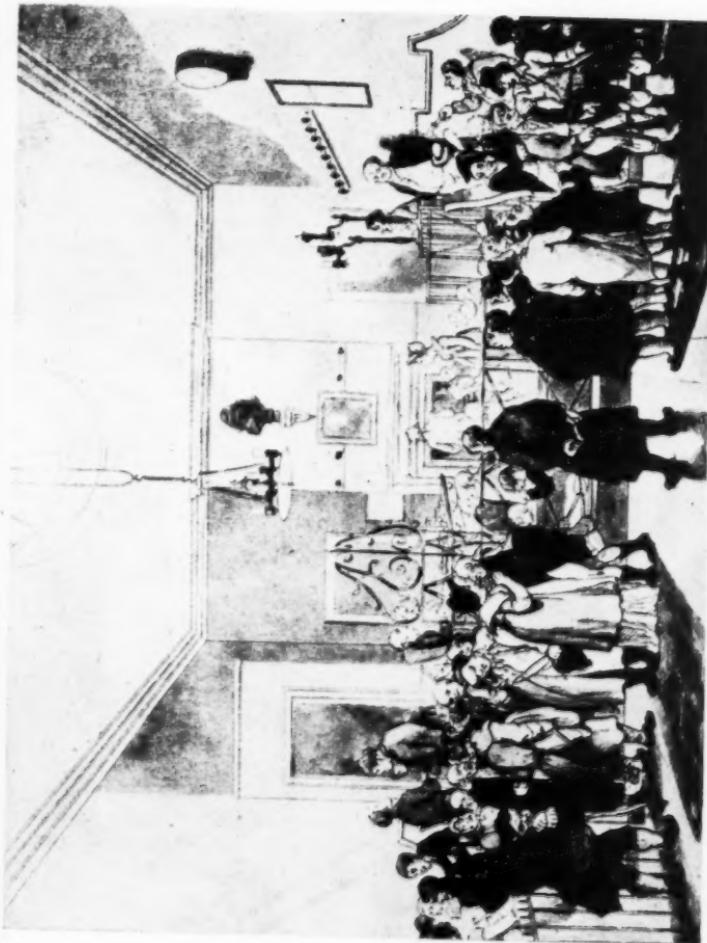
A few additional comments and suggestions may add to the interest of those who are interested in Fielding.

The growth of Fielding's reputation as the father of the English novel, and the conflicting views in regard to his character, moral standards and habits of life, which have resulted from carelessly made, and carelessly repeated statements and generalizations, by Arthur Murphy, his first biographer, and later even by Thackeray and Henley among others, have obscured that part of his career during which he made his great contributions to the development of professional, judicial, and social standards in the shaping, and in the practical administration, of the criminal law. The history of Fielding's reputation since his death as influenced by his biographers, defamers and apologists may be read in the third volume of Cross's "History". Few men of such genial characteristics have had such bitter and vituperative enemies whose enmity, of course, was caused by his wit and his power of satire, and few reputations have had so curious a career.

Fielding's novels and his work as a magistrate and as a suggester of remedies came at the same time as the work of his friend and contemporary, Hogarth, and together they exercised an influence similar to that of Dickens and Charles Reade in the following century. The picture which Fielding draws of the corrupt justices of the peace before he became a magistrate reminds one not only of the descriptions of early days in the legal profession in this country as described by Mr. Simmons in the address printed in this number, but also of some of the disclosures of the Seabury investigation as to recent conditions on the New York City bench.

Hogarth's print entitled "Night" which appeared in 1738 is generally understood to contain a satire on the life of Sir Thomas de Veil,\* who preceded Fielding in the Bow Street Court and also furnished the life model for Fielding's "Justice Thrasher" in his novel "Amelia," written while he was a magistrate, partly for the purpose of exposing the conditions which he was fighting. Hogarth's famous print entitled "Gin Lane" also illustrates the social conditions which Fielding was attempting to remedy through better regulations of the liquor traffic. That condition was described by Smollet in his history of England and is suggested by the invitation on the doorway of the gin cellar in Hogarth's picture:

\* See "Works of Hogarth," 1833 Edition by Jones & Co.



THE OLD BOW STREET OFFICE

(From the Sketch by Rowandson and Pugin in Ackermann's "Microcosm of London")

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"Drunk for a penny  
Dead drunk for twopence  
Clean straw for nothing."

"Fielding's vehement exposure of the alarming extent of drunkenness and its serious effects, received powerful assistance from the publication of Hogarth's 'Gin Lane'. The friendship and mutual esteem of Fielding and Hogarth makes it unlikely that the almost simultaneous appearance of the pamphlet and the print was a coincidence. In any case, their joint denunciation of the evils of gin-drinking met with immediate success, for Parliament once again attempted to grapple with the question of licensing."

The foregoing account of him may well be closed with a few sentences from the end of Governor Cross's final chapter on "Fielding As He Was". Governor Cross says:

"The novel (*Tom Jones*) is a summary of the age by a man who turned upon it the light of an extraordinary intelligence, who was besides infinitely wise and sagacious, and tolerant of human errors and follies where the heart remains true. . . ."

"It has seemed to many a violent transition from the man who wrote 'Tom Thumb' to this ardent reformer—indeed as if there were two personalities called Henry Fielding. The differences between the Fielding of 1730 and the Fielding of 1750 are, however, more apparent than real. They are no greater than one should expect in a man who lived the life he lived. His development under the stress of changing circumstance was perfectly natural and logical, like the development of a great character in a great novel. He had a mind most responsive to his immediate surroundings; and therein lay the prime element of his genius. Seeing things as they were, he always liked so to represent them; he liked to preach and moralize as well. The most laughable farces of his youth, his regular comedies, and his political satires, all had their moral or corrective inferences. He would drive from the stage ranting tragedy, pantomime, and the Italian opera; he would expose social degenerates masquerading in fair forms; he would uncover all the devices and stratagems of the corrupt politician, whether of his own or of another party. He was a pamphleteer long before he took his seat in the Bow Street court."

When he was appointed "the principal justice of the peace for Westminster" in the Bow Street court just as had happened when he was playwright, novelist, and political writer, he reflected completely the new environment. From his court, from his pen, came the information on which were framed laws for the decrease of crime. To this one end he laboured day and night, sacrificing his health and finally his life.

"By an inevitable process the wit and humorist passed into the moralist and reformer. The permanent loss to literature was immense; but the immediate gain to society was immense also. At the same time his last post brought out all the finest qualities of Henry Fielding's nature and touched the close of his career with quiet heroism."

## SIR JOHN FIELDING.

This story should not close without a brief reference to Henry Fielding's brother, who succeeded him at Bow Street as "Principal Acting Magistrate for the County of Middlesex and City and Liberty of Westminster". Mr. Dilnot, in his "Story of Scotland Yard" says (at page 12) :

"Fielding died in 1754, and his place was taken by his half-brother and assistant, no less notable a man. For Sir John Fielding was blind. Yet his energy and initiative were, if anything, in advance of those of his brother. He had a close and intimate acquaintance with all phases of crime, and very distinct ideas on the manner in which it should be suppressed. He it was who brought into being the most efficient service of police for London that was known before the creation of the Metropolitan Force."

F. W. G.

THE ACT OF CONGRESS PROVIDING FOR RULES OF CRIMINAL PRACTICE AND PROCEDURE TO BE MADE BY THE SUPREME COURT.

"(Public—No. 371—72d Congress)  
(S. 4020)

## AN ACT

To give the Supreme Court of the United States authority to prescribe rules of practice and procedure with respect to proceedings in criminal cases after verdict.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict in criminal cases in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, in the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, in the United States Court for China, in the United States Circuit Courts of Appeals, and in the Court of Appeals of the District of Columbia.

SEC. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and of preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

SEC. 3. The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

Approved, February 24, 1933."

## APPORTIONMENT OF LOSSES ON MORTGAGE FORECLOSURES.

DEALING WITH MORTGAGE LOANS AS TRUST INVESTMENTS.  
GUY NEWHALL.

*(Reprinted from "Trust Companies" for —— 1933.)*

**(EDITOR'S NOTE:** *Problems met by trustee in dealing with mortgage foreclosures as real estate assets, and especially as related to apportionment between life tenant and remaindermen, have been discussed in a series of articles in TRUST COMPANIES during the past year. The subject acquires importance because of the lack of definite judicial rules. Mr. Newhall in the course of a recent discussion before the corporate fiduciaries of Maine, submits some interesting conclusions especially with regard to salvage operations arising from mortgage foreclosures.)*

Under present conditions trustees are in many cases faced with losses arising out of mortgage foreclosures, and need a working rule to guide them. Unfortunately there is no definite rule available. I know of no decision in either Maine or Massachusetts, or, for that matter anywhere in New England, which gives us much to go on. Consequently, in the discussion that follows, it must be understood that I am merely giving my opinion, which may or may not coincide with the ultimate views of our respective supreme courts. There are authorities outside of New England which are in accord with the opinions herein expressed and apparently the field is wide open for the court to follow them if it wishes.

### A PROBLEM IN APPORTIONMENT.

The problem may be stated as follows: A trustee holds a \$10,000 6 per cent mortgage, on which \$400 of interest is in arrears at the time of foreclosures. He forecloses and bids the property in for a nominal amount. He holds it for one year and then sells it for \$6,000. At the time of the foreclosure he pays out for foreclosure expenses, taxes, etc., \$500. During the year he pays out for current taxes, insurance, and upkeep, \$500 more. Also \$600 additional interest on the note has accrued during the year. The expenses incident to the sale are \$100. No income was received on the property during the year. How are the proceeds of the sale to be divided?

It seems obvious that we are dealing with a salvage operation. The real investment is an interest-bearing note, which has gone sour. The trustee is merely salvaging some of the security, which

might have been stocks and bonds as well as a real estate mortgage so far as the principles we are discussing are concerned. He is protecting the estate by salvaging the security on the note. That this is the true legal situation is apparent when we consider that he undoubtedly could buy the property at the foreclosure sale, even though the trust instrument forbade investments in real estate. *In re Marshall*, 88 N. Y. Supp. 550. Note, that I assume he buys with the intention of selling as soon as possible, *i.e.*, a real salvaging operation. If he buys the real estate at the foreclosure sale intending to hold and operate it as a permanent investment, an entirely different situation is presented, not included in this particular discussion.

In the first place, my opinion is that as it is a salvaging proposition there should be an apportionment of the net proceeds of the sale between the life tenant and the remainderman in proportion to their respective interests. Ten thousand dollars of capital and \$1,000 of accrued interest on the promissory note are represented by the net proceeds of the sale of the security. I see no distinction between a salvage of this sort and that which occurred in the leading case of *Parsons v. Winslow*, 16 Mass. 361, where a trustee embezzled \$30,000, and after two years' litigation his successor recovered \$29,000. The court held that the proceeds should be apportioned. The method of apportionment used in that case was to find a new principal by determining what sum invested at 6 per cent for the given period would amount to the sum salvaged. This is a different method but reaches the same results as the one suggested above.

#### DECISIONS SUPPORTING APPORTIONMENT.

Two states have a line of decisions supporting the idea of apportionment in mortgage foreclosure cases, New York and New Jersey. It is also the rule in England. The New York cases are *In re Marshall*, 88 N. Y. Supp. 550 (a surrogate's decision containing a comprehensive and interesting discussion); and *Meldon v. Delvin*, 53 N. Y. Supp. 172, affirmed in 167 N. Y. 172; *In re Pitney*, 99 N. Y. S. 488.

The New Jersey cases are *Hagan v. Platt*, 48 N. J. Eq. 206; *Tuttle's Case*, 49 N. J. Eq. 259; *Trenton Safe Dep. Co. v. Donnelly*, 65 N. J. 119; *Parker v. Seeley*, 56 N. J. Eq. 110; and *Skinner v. Boyd*, 130 Atl. 22. A similar opinion is expressed in Loring's Trustee's Handbook, pp. 156-7.

The leading English cases are *Re Atkinson*, 1904, 2 Ch., 160; *Re Alston*, 1901, 2 Ch., 584; *Re Moore*, 54 L. J. Ch., n. s. 432. See also "Lewin on Trusts," 13th (English) ed., p. 966.

The idea of apportionment is supported by a comparison between stocks and bonds. Suppose a trustee purchased a \$1,000, 6 per cent bond at par. Later payment was defaulted on the coupons for two years, and the trustee then sells for \$600. The face of the bond represents \$1,000 principal and \$120 interest, and both principal and interest are reflected in the sale price. Can there be any doubt that the sale price should be apportioned? On the other hand, suppose the trustee bought ten shares of stock at par and the stock passed its dividend for two years and was then sold for \$600. There would be no apportionment. It is all capital. It seems to me that the difference is between an interest-bearing investment, where the ultimate salvage represents or reflects both capital and accrued income, and a stock, which by its nature is subject to market fluctuations and the dividend or income on which is not an obligation but an expectation. On which side of the line a cumulative preferred stock would fall I do not venture an opinion.

As previously stated, the question of apportionment seems to be an open one in Maine. It is also open in Massachusetts except for the line of cases dealing with the apportionment of the proceeds of sales of vacant land by trustees. These cases are *Stone v. Littlefield*, 151 Mass. 485; *Edwards v. Edwards*, 183 Mass. 581; *Jordan v. Jordan*, 192 Mass. 337; *Ogden v. Allen*, 225 Mass. 595; and *Creed v. Connolly*, 272 Mass. 241. The last named decision completely rejects the idea of apportionment on sales of vacant land unless it appears to have been the testator's intention. It seems to me, however, that there is a broad distinction between a sale of vacant land forming part of the original testator's estate, wherein the question of intention may be material, and the salvage of real estate held under mortgage as security for an interest-bearing note, where there never was any intention of acquiring or owning the real estate.

The English decisions are not based so much on the salvage theory as on the idea that the mortgage stands as a security for both the principal and income of the note equally.

#### DEDUCTION OF EXPENSES.

After reaching the conclusion that there is to be an apportionment of the proceeds, several difficult questions remain to be

settled. On which side of the line do the various receipts and payments fall? I assume without any hesitation that all expenses incident to making the sale, such as brokerage and other adjustments, are to be deducted from the gross selling price to determine the net selling price. This would seem to be too self-evident to require argument.

At the other extreme I think we may state with equal positiveness that all expenses incident to the foreclosure are a charge against the fund, or against capital, whichever way we may express it. These expenses would include the ordinary legal and other expenses of conducting the foreclosure and such taxes and other payments as circumstances require to be made at the time. In the same class I should put any expenses for repairs, etc., which had to be made at the same time for the welfare of the property. The whole line of New York and New Jersey cases sustain this proposition, and in Massachusetts the case of *Stone v. Littlefield, supra*, supports it.

Intervening expenses, taxes, and other carrying charges, accruing during the period of ownership, present the most difficult question. Are these to be deducted from the income of the life tenant or do they come out of the proceeds of the sale before apportionment, thus making each bear his proportionate part? There are two contradictory principles involved. One is the well established doctrine that all taxes and other current expenses come out of income, and the other is the theory that as we are dealing with a salvage operation current taxes and expenses are as much a part of the salvage costs as the taxes and expenses incident to the foreclosure. The New Jersey cases seem to adhere to the former, while New York cases to the latter. Hence the honors are even so far as authority is concerned. The question does not seem to have been raised in the English cases. In the New York cases the trustee paid the intervening taxes, etc., out of capital as he went along.

#### THE MARSHALL DECISION.

The New York case of *In re Marshall* contains by all odds the most comprehensive discussion of the whole question, though unfortunately it is only a surrogate's opinion and has not the authority of a decision of the Court of Appeals. It is, however, well worth reading. It is very illuminating and logical, and represents the view I am inclined to adopt. If you are going to view

the situation as a salvage proposition, all expenses incident to the salvage should be deducted.

What about intervening rents or other income? It seems to me that the view to be adopted depends on the decision made as to intervening expenses. If intervening expenses come out of the life tenant, then logically he should have the intervening rents. On the other hand, if the salvage theory prevails, and intervening expenses are deducted from the proceeds of the sale, then the intervening rents should be added to it. Usually, however, there are no intervening rents.

In conclusion, then, but by no means exhausting all the questions involved, my own personal theory is that we should add together the gross proceeds of the sale and any intervening income. From this we should deduct all the expenses incident to the foreclosure, the expenses of making the sale, and all the carrying charges. The result thus obtained should be apportioned between the life tenant and the remainderman in proportion to the amounts of principal and accrued interest represented in the salvage.

On the above theory the trustee could pay all the expenses out of capital as they accrue. If he does that, it seems to me that he must credit the intervening rents to capital to offset it. He certainly could not pay intervening rents to the life tenant without first deducting all intervening expenses or pay an amount in excess of what he estimates will be coming to the life tenant on the final apportionment. Further, I do not see how he can pay any current income to the life tenant unless income is actually received.

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#### THE FIRST FAILURE OF A BOSTON BANKER AND ITS RESULTS.

In these days of bank failures and the result, it may be of interest to the people of Massachusetts—not excluding the bar—to learn of the first bank failure in the Province of Massachusetts Bay and its result.

An account will be found in volume V, pp. 20–22, of *Acts of the Privy Council of England: Colonial Series*, published by His Majesty's Stationery Office, London, 1911—a volume which no one should neglect to read who takes an interest in the story of the American Colonies, how they were governed and interfered with. Imperial ineptitude and insistence and Colonial pertinacity and determination. While a few of the American Colonies were relieved

of the duty of transmitting their legislation for the Royal Approval—or Disapproval—in the Privy Council at Westminster, Massachusetts Bay was not so favored; and the Acts of her Legislature were sent across to London with more or less promptness and regularity.

The Agent for the Colony in London, on November 7, 1766, delivered nine Massachusetts Acts passed in the June preceding—these were sent by the Privy Council to the Committee for Trade and the Plantations and the Committee referred them, November 29, to the Board of Trade, which was charged, *inter alia*, with the supervision of the Plantations, chiefly, be it said, in the interests of British commerce.

Among these Acts was one repealing two previous Acts of 5 George III (1764-5) for preventing fraud in debtors and securing the effects of insolvents for their creditors. The Board of Trade had a letter from the Governor of the Province accompanying the repealing Act and stating the alleged reason for it.

The Governor said “that the Province of Massachusetts Bay had long Laboured under the want of a Bankrupt Act, . . . that, of late, every Insolvency had afforded Instances of great Partiality and Injustice . . . that the Common Method had been for the Creditor who got the Earliest Advice of a persons becoming Insolvent to sue out Attachments against the Goods and Credits of the Insolvent according to the Custom of the Country, and help himself to such part thereof as he pleased . . . that a general Scramble ensued . . . Goods were Sold in a hurry at a low Value and great part of the Effects of the Debtor spent in Law Proceedings and Contests between Contending Attachments . . . that this had been felt and Complained of ever since he had been Governor there (*i.e.* in Massachusetts) but no Adequate Remedy Attempted before; That a Gentleman who had Acted considerably as a Banker had lately Stopt Payment for One hundred and seventy thousand Pounds Sterling (£170,000 Stg). That this was like an Earthquake to the Town (Boston). Numbers of people were Creditors, some for their All, every one dreaded the Consequences, lesser Merchants began to fail, a stop to all Credit was Expected and a general Bankrupcetey was Apprehended for a time . . . Application was made to the General Court for Relief, but it was difficult to say what could be done there; That at last, it was thought proper to send to New York for Copies of their Acts for the relief of the Creditors of Insolvent Debtors, which having

Your Majesty's Consent, either tacit or expressed, it was presumed that a Bill of like Nature would be Admissible there (in Massachusetts Bay): That from the New York Acts, the former of these Acts now repealed . . . was framed . . . not differing materially from them . . . that it must be expected, that Experience would point out some necessary emendments of that Act and therefore it was Enacted only for three Years."

The second of the repealed Acts was "Calculated to Improve the Provisions and Extend the Equity of the former . . . by this Act where a Creditor has made a partial Attachment of Goods, he had his Option whether he will adhere to his Attachment or to his share in a general Dividend; That if he Chuses the latter he must bring in the Attacked Goods to the Common Fund, and that this is Equity and would help to do justice to foreign Creditors who stand no Chance in a general Scramble."

This being the Boston Bank Failure and this legislation the result, let us see what followed.

The Lords Commissioners of the Board of Trade went into the matter fully, thought the two repealed Acts to be "both in their Principal and provisions, just and necessary Regulations . . . it was a great Satisfaction to them to see the Legislature of this Province Adopting a Measure calculated in general to give stability to public Credit and Security to the fforeign Creditor". But as they "were of a Temporary Duration", the Lords Commissioners "thought it Adviseable to suffer them to lie by Probationally, Trusting that what the provinee had for the present only Adopted as an Experiment, would have been found so Convenient and Advantageous as might have induced a future Law, by which a Provision in Cases of Insolvency might have made in this (as it is in most other Colonies) a permanent part of the Constitution. But that by the present Act both these Laws are intirely set aside upon a general Suggestion of Inconvenience, unaccompanied with any Representation of what that Inconvenience was . . . . and, therefore", the Board advised its disallowance.

The Board so reporting, the Committee agreed with them and reported in that sense to the Privy Council, June 30, 1767; and the Act was disallowed, July 24, 1767.

Anyone who fails to see British Trade behind the curtain is not acquainted with Colonial history.

OSSGOODE HALL, Toronto.

WILLIAM RENWICK RIDDELL.\*

\* Justice of Appeal, Ontario.

### THE MOVEMENT TO REVIVE THE "CHILD LABOR" AMENDMENT.

(Continued from page 61)

Mr. Shattuck and others pointed out that the amendment, while it bore the sentimental description of a "child" protection measure, was in fact a grant of power to the federal government in Washington to control the lives to an almost unlimited degree of all persons under the age of eighteen and indirectly the lives of the families to which those persons thus "regulated" from Washington might belong.

In regard to the arguments that congress would not exercise powers granted by the broad words of the amendment to the fullest extent to which the language can be strained, Thomas Jefferson wrote in 1787: "I consider all the ill established which may be established," and Jeremiah Mason, more than a century ago, said, "Experience shows that legislatures are in the constant habit of exercising their power to the greatest extent. They intentionally act up to the very verge of their authority." Every thinking person familiar with American history knows that the truth of Mason's statement has been demonstrated over and over again, and never more clearly than during the past year.

Hon. Clarence E. Martin, President of the American Bar Association, opposed the ratification of the amendment in his recent address, which appears in the October number of the "Journal" of that association, pages 551-552. He said:

"When the amendment was submitted all, but six, of the states rejected it. Nearly ten years have elapsed since it was submitted and discussed. . . . Nine of them have sought to change their respective votes this past year and ratify the amendment. Has the time limit for consideration expired—or are we still within that sphere, called by the Supreme Court, a reasonable time after proposal?"

The executive committee of the American Bar Association recommended a resolution opposing the adoption of the amendment, which appears on page 557 of the "Journal" for October, and this resolution appears to have been adopted as follows:

"Resolved by the American Bar Association that the proposed 'Child Labor' Amendment to the Constitution of the United States should be actively opposed as an unwarranted invasion by the Federal Government of a field in which the rights of the individual states and of the family are and should remain paramount. It should also be opposed on the ground that the Constitution should not be encumbered by prohibitory legislation. We maintain that notwithstanding difficulties encountered in the control of child labor products in interstate commerce, the cure for the admitted evil must be sought through state legislation, in connection with which the attention of the public should be drawn to the Uniform State Child Labor Act approved by this Association in 1930."

This resolution appears to have been adopted by the association at the meeting at which it was presented at Grand Rapids in August.

As Mr. Martin points out, the movement for the repeal of the eighteenth amendment and the movement for the adoption of this proposal for unlimited federal regulation from Washington of every person up to eighteen years, with all the incidents of such "regulation," seem "contradictory in purpose and design." Has not the practical principle of local self-government in personal and family matters contributed to the strength of the nation and encouraged the "rugged individualism," of which Governor Ely speaks? Is it not worth protecting in the interest of future children?

F. W. G.

## JUDICIAL SELECTION

By D. A. SIMMONS

President of the First District Bar Association

*An address delivered at the second annual meeting of The Bar Association for the First Supreme Judicial District of Texas, June 3, 1933, Houston, Texas*

INTRODUCTORY NOTE.—We reprint here the exceptionally interesting account by Mr. Simmons of the development of methods of selecting judges in different parts of the country, since the Revolution. Mr. Simmons is not only a leader of the Texas Bar but an active leader of the American Bar in his position as chairman of the Conference of Bar Association Delegates. The picture of the administration of justice in the pioneer days of Alabama and other parts of the South and elsewhere is illuminating. The whole story indicates that whatever may be the faults of our Massachusetts bench the people of Massachusetts have shown good sense in sticking to her original principle of an independent judiciary which grew out of the experience here just before the Revolution on which Thomas Jefferson based the statement quoted by Mr. Simmons from the indictment of George III in the Declaration of Independence.—F. W. G.

In the middle of the farm belt a judge is dragged from the bench, cuffed and hauled by a masked mob, stripped of his clothing, daubed with axle grease, beaten, swung into the air by a rope tied about his neck, and lowered only when at the point of collapse he is told to swear that in matters coming before his court he will follow, not the law, but the demands of the mob. He refuses, and is again swung by his neck; this time being lowered and told to pray. He kneels in the dust at the feet of the violent men and prays to the Lord of Hosts that he may do justice to all men. Silence falls upon the crowd, and one by one the men, individuals now instead of a mob, slink away.

So far as the record shows, these men had no personal quarrel with the judge. Caught in the vise of circumstances, they were striking in blind fury against a condition in which they found themselves. That condition was partly self-made and partly world-made. A few years before, they, with all of us, had listened with willing ears to the oft told tale that a new era had dawned. No more would Famine and Want follow in the footsteps of Prosperity and its wilful brother, Speculation. In economics, cycles had gone out of style and the upward curve of the chart was the new mode. Delusions of grandeur became the accepted state of mind. Prosperity was not to end, but would be followed by greater prosperity.

Booms no longer were to end in collapse of inflated values, but were to bring on more and better booms. Work and service were no longer the means to success. The ticker tape, the sharp pencil, the agile tongue, something for nothing, other people's money, the stretching of credit until it was so thin it would seem anyone could have seen through it; these became the symbol of the times.

If a man owned a farm, he bought two more and mortgaged all three to properly stock them in keeping with his new position in society. The man who sold them put his takings into the market and retired to the seashore, where he could watch the wild waves with one eye and the wilder stock market reports with the other. His city cousin traded in his little home—free and clear, of course—on a large one with a larger mortgage. And then, to do it up right, he bought a business corner and two apartment houses, on credit, so that the tenants could support the family in the style to which they hoped to become accustomed.

It was a great dance while it lasted, but now it is over. The grandeur is gone; the delusions are gone; and all that remains is to pay the orchestra. Pay? Who can pay? Who will compel payment? Why, the courts! The courts? We, the sovereign people, made the courts. Away with them! Hang the judge!

And so, an incident may illustrate a great principle. For the judge who becomes the instrument for the liquidation of a people's folly, may become, under other circumstances, the defender of their ancient liberties. This is not the first time a sovereign has sought to set aside the established rules of law and compel a judge to do his bidding, nor will it be the last. Out of the history of the past we trace the bitter conflict of the powers of Might and Right as it relates to the judiciary. Autocratic Might used the power of appointment and a tenure during the king's pleasure to compel judgments favorable to the monarch. Right demanded equal justice between all men according to the predetermined law. Assurances of this could only be had by obtaining an independent Judiciary. Considered opinion prescribed three safeguards: (1) The power of appointment was limited by requiring confirmation by representatives of the people,

(2) tenure was during good behavior of the appointee, and (3) a fixed compensation could not be abolished or decreased during the term of office. In England, this method has produced satisfactory results since its adoption two and one-half centuries ago.

It was the method largely in use in this country during Colonial and Revolutionary days. I say largely, because in Massachusetts, Pennsylvania, Maryland, New Hampshire and Delaware, the executive was the moving force in making appointments. At that time the legislature kept a firm hand on appointments, and in Connecticut, Rhode Island, New Jersey, Virginia, North Carolina, and South Carolina actually selected the judges.

Commencing, as our governmental institutions did, in a relatively simple form, and in an age comparatively free of modern complexity, they have developed without definite plan. Like Topsy, "they just growed," so that, with the increase of population, and the growing complexity of all human relations, the executive branch of our government, floundering in an attempt to perform first one new function and then another, added bureaus, boards, commissions and offices, largely independent of each other and with no correlation; with the result that we have confusion, duplication, overlapping of functions, conflict of jurisdiction, and unnecessary cost. So, too, it is with the judicial branch. Instead of having one coordinated court, with trial and appellate divisions, we have justice's courts; traffic courts; probate courts; lunacy courts; juvenile courts; courts of domestic relations; municipal, county, district, circuit, appellate and supreme courts; besides commissions that function as courts, and commissions and bureaus that function first as investigators and then courts; until we end in confusion worse confounded.

A unified court, performing within itself all of the judicial functions, would certainly be more efficient and less expensive; and should not be beyond the capacity of civilized man. It seems obvious that there should be a court administrative office, assigning judges to the various types of work, having due regard to the experience and ability of the various judges, or, lest we tread upon judicial dignity, as-

signing particular types of cases to the judges best qualified to handle them.

All modern states recognize that the proper performance of a judicial function depends upon the personnel who administer the law. A judge must not only have character and ability, but he must be independent of all influences, except the single commandment that the law must be justly enforced without fear or favor. In general, this requires that he be independent of any influence which might swerve him from that end. Political, financial, religious, and social considerations should not be permitted to influence a decision. The only way that this can be guaranteed is to select men of a character who will not permit personal or private influence to affect them; and then see to it that they are free from financial and political pressure. If we would attain that ideal—of a government of laws and not of men—we must have men to interpret the laws without respect of persons, or things, or politics, or pressure. The freedom of the judiciary from the influence of an arbitrary monarch was not obtained until the Act of Settlement, following the English revolution of 1688. The Stuart kings and their predecessors had appointed judges during the royal pleasure, and did not hesitate, when cases were pending before them, to advise them privately as to the way it would be well to decide them. This condition developed in people a fear of the tyranny of appointed judges—a fear which misconceived the cause of their misery. The appointment of judges was not the cause of tyrannical acts, because judges have been appointed in every country in the world since earliest times. Judicial tyranny arose from the fact that judges were not appointed for learning alone, and, when appointed, were not free from the pressure of outside influence. The difference should be obvious between a judge appointed by a tyrant to wreak vengeance upon his opponents, and a judge appointed by a representative of a free people, to administer even-handed justice between man and man. You will recall that the Declaration of Independence complained against the King of England because "he made judges dependent upon his will alone for the tenure of their office and the amount and payment of their salaries."

In considering the matter of judicial selection, it may not be amiss to suggest that kings are not the only tyrants, and that majorities sometimes run roughshod over what are supposed to be the rights of minorities. One need but glance at current newspapers, and delve no deeper into history than the present day, to know that rights are disregarded, not only by individuals, but by governments, by reason of race, religion, and economic interests. Recent edicts of Hitler's government swept from office many jurists because they had been guilty of being members of a race which gave to civilization some of its greatest glories.

When it is understood that the proper function of the court is to protect the rights of an individual from aggression, whether that aggression comes from another individual, from the state, or from the majority of the people, one is not so sure that frequent elections by the people is the way to assure that the judicial function will be properly performed.

As Chief Justice Taft said, in an address on the judiciary, delivered when he was President, the judiciary are not representative of the people, whether they are appointed or elected.

"The moment they assume their duties they must enforce the law as they find it. They must not only interpret and enforce valid enactments of the legislature according to its intention, but when the legislature in its enactments has transgressed the limitations set upon its power in the constitution the judicial branch of the government must enforce the fundamental and higher law by annulling and declaring invalid the offending legislative enactment. Then the judges are to decide between individuals on principles of right and justice.

\* \* \* As between the individual and the state, as between the majority and the minority, as between the powerful and the weak, financially, socially, politically, courts must hold an even hand and give judgment without fear or favor. In so doing they are performing a governmental function, but it is a complete misunderstanding of our form of government, or any kind of government that exalts justice and righteousness to assume that judges are bound to follow the will of the majority of an electorate in respect of the issue for their decision. In many cases before the

judges that temporary majority is a real party to the controversy to be decided. It may be seeking to deprive an individual or a minority of a right secured by the fundamental law. In such a case, if the judges were mere representatives or agents of the majority to carry out its will, they would lose their political character entirely and the so-called administration of justice would be a farce." (William H. Taft, *Judiciary and Practice*, an address delivered at Toledo, Ohio, March 8th, 1912.)

### EXECUTIVE APPOINTMENT

Executive appointment is the method in use by the Federal government and in all foreign countries, with the possible exception of England, where the actual selection seems to be in the hands of the Lord Chancellor.

Whether this is the best method has occasioned considerable dispute, but the arguments in favor of it are:

That it fixes responsibility in the executive, who is in a position to make a thorough investigation of the capacity of possible appointees. Certain it is that a very high standard has been attained in most of the jurisdictions having executive appointment, and the reason for this usually given is that lawyers of the highest standing at the bar will accept an appointment, where they will decline to enter a political contest in which the only issue is personal qualification for an office. Certainly, an appointment can be considered without the heat and fury of a campaign; and political endorsement of machines, if such there be, can largely be offset by the endorsement of individuals and organizations who are known to have in mind only the best interests of the community. Then, too, the prospective appointees are relieved of any campaign for office, with the attendant primary and election expense. Qualifications for a good candidate are seldom those of a good judge. How the average voter can pass on the scholarship, temperament, experience, integrity, and professional standing of a candidate, is difficult to understand.

The argument in favor of executive appointment may be summed up by a quotation from Alexander Hamilton, in the *Federalist*, wherein he says:

"I proceed to lay it down as a rule, that one man of discernment is better fitted to analyze and estimate the peculiar qualities adapted to particular offices, than a body of men of equal, or perhaps even of superior discernment. The sole and undivided responsibility of one man, will naturally beget a livelier sense of duty, and a more exact regard to reputation. He will, on this account, feel himself under strongest obligations, and more interested to investigate with care the qualities requisite to the stations to be filled, and to prefer with impartiality the persons who may have the fairest pretensions to them."

On the other hand, the reasons advanced against such appointments are:

That it builds a system of patronage which may be influenced or dictated by special interests; that the judges are removed from public control, may become forgetful of the interests and needs of the people, and tend to become autocratic and dictatorial. Further, that the appointment of judicial officers by the head of the executive department is a violation of the American doctrine of the separation of the powers of government.

At this time, executive appointment, with or without legislative sanction, is the method of selection used by foreign countries, the Federal government, and by Massachusetts, Connecticut, New Hampshire, Delaware, Maine, Mississippi, New Jersey, and, as to circuit judges, by Florida.

#### DIRECT ELECTION

In all the other states except Rhode Island, Vermont, Virginia, and South Carolina, judges are elected by direct vote of the people.

The movement for the direct election of judges commenced in the frontier country of the then southwest about one hundred years ago. It was an unusual time. Twenty years of peace on the Atlantic Seaboard had turned the thought of the adventurers toward the wilderness to the west. Many adventurous spirits, urged on, as the saying was, by hunger and at the request of friends, started for Alabama, Mississippi, Tennessee and the unknown land beyond. Along

with this tide of humanity went lawyers and near-lawyers, young and old. Magnificent accounts came from that alluring country of fussing, quarreling, murdering, the making and breaking of contracts in wholesale fashion, and a whole catalog of actions and cross-actions which sounded like a paradise of litigation in all the departments of civil and criminal law. It was a legal Utopia, peopled by a race of adventurers and eager litigants who had flocked from the older settlements in search of their fortune, or, if not their fortune, in search of that of someone else. Half the population had recently arrived, and was composed mainly of single men. Gambling and wild speculation in all elements of property was the order of the day. Young lawyers arrived by the score and, without examination, were freely granted licenses by the local trial courts. As Baldwin said in his remarkable book of the time, "Flush Times in Alabama," "the general thought seemed to be that judicature was a tanyard where clients' skins were carried to be worked over. The idea that justice had anything to do with trying causes, or sense had anything to do with legal principles, never seemed to occur to them once, as a possible conception." (Baldwin, Jos. G., *Flush Times in Alabama*, page 50.)

Every crossroad and every avocation presented an opening through which a fortune in near perspective was seen by the adventurer. Those, indeed, were boom days and times of wildest speculation; all, of course, based on credit. Society was wholly unorganized, and there was no background of restraining public opinion or historical necessity which compelled an orderly administration of justice, or, in fact, anything else in an orderly fashion. In short, the world was "on the make." It was reported that for two or three years in that period ninety per cent of the receivers of public money in the frontier country were either actual defaulters or short in the public funds. "Instead of taking to the highway and calling on the wayfarer to stand and deliver, some unscrupulous horse doctor would set up as a physician and surgeon and draw a lancet on his victim or fire at random a box of pills into his bowels on the vague chance of hitting some disease unknown to him. Every

wornout constable or justice of the peace from the East suddenly became an attorney and counsellor at law." (Baldwin's Flush Times in Alabama, page 89.)

The politicians thought little and cared less for a system of judicial selection which would place upon the bench only those who were best fitted by character and ability to decide according to the strict rules of law the controversies which came before the courts. It is not to be inferred that great lawyers and judges did not develop under the fire and clash of those times, because the record conclusively proves that some of the outstanding lawyers of the day came from and practiced in the southwest country of the period.

The court was the center of the stage around which revolved the public spectacles, political debates, and the major interests of the people. The greatest spectacle of the times was the sessions of the criminal court, where natives gathered in the courthouse to watch their favorite advocate "do up judicature." As one layman wrote of his favorite lawyer of the period, he could "entangle justice in such a web of law that the blind hussy could have never found her way out again even if Theseus had been there to give her the clew."

It is little wonder that these people, sturdy pioneers who felt qualified to build an empire and practice all trades and professions, whether they were trained therefor or not, felt that within themselves they best knew who could administer their rough affairs in the manner most suitable; and so into their hands they took the matter of election of all public officials, including the judiciary, that branch most intimately connected with their fortunes. From this center, with Jackson as its prophet, the principles of direct democracy spread far and wide, and with them spread the new theory of the direct election of the judiciary by the people. It is interesting to note that Mississippi, the pioneer in this movement, had theretofore had an appointed judiciary, where the judges served during good behavior. The Constitution of 1832 marked the change to direct election. This Constitution was the child of the boom days, which rose to a flood tide in 1836, when it swept on across the

Mississippi to San Jacinto, which sealed the independence of the Republic of Texas.

The subsidence of the boom within the decade was followed in Mississippi twenty-five years later by the abandonment of the direct election of judges. Whether we may say that the people who inaugurated the experiment realized its defects and abandoned it, we do not know. That idea took root and, though rejected in the place of its birth, spread far and wide to other jurisdictions.

By the time of the Civil War, nineteen of the then thirty-four states selected their judges by direct vote. With the extension of civilization westward, this procedure moved forward with the pioneers, and it may safely be said that in all pioneer and rural communities from that time to this, lawyer and layman alike generally favor selection by popular election; while in the older sections of the country, and especially those in which the population has become more dense, a movement, led by the bar, has increased in strength and has as its purpose a method of selection more closely akin to that which the history of other legal jurisdictions has endorsed as more satisfactory.

The arguments usually advanced in favor of direct election are: That in a government of separate powers each should be elected by and directly responsible to the people; direct election permits the people to retain a check upon the judiciary lest it fail to remember the rights of the people and come under the domination of special interests; that diversified political, racial, and social groups may have as their judges persons who come from their groups and understand their problems; that judges so elected are less influenced by wealth and social position; and finally, that the people are able to judge of the claims and qualifications of the candidates, and have a much stronger inducement to make proper selection of judges who may pass upon questions vital to them, than would be the case where appointments are made at a distance by one whose major interests would be to strengthen his own political position, and to dispense patronage.

The major arguments which have been directed against this method are: That politicians have not been noted for

keeping hands off the judicial office, especially in close elections, and the result is that in states where a sharp party contest is waged, with the voters voting the party ticket, judges share the fate of the other candidates in the party; that an elected judge is susceptible to the influence of public opinion on public controversies; that many qualified men refuse to enter a personal contest for a position which should be strictly non-partisan; that the selection is really made in most instances by a political boss or a party clique, and hence irresponsible appointment has been substituted for responsible appointment; and finally, where it is not a matter of party nomination, it becomes one of self nomination, and "self-starters" are not always the best type for judicial position.

Rufus Choate, in his exhaustive and masterful speech before the convention for the revision of the fundamental law of Massachusetts, in 1853, pointed out the fact that the judge under the election system is **appointed** by the leaders in the caucus of the prevailing party, and then goes on to draw a picture of the elected judge coming upon the bench for the first time:

"So nominated, the candidate is put through a violent election, abused by the press, abused on the stump, charged 10,000 times with being very little of a lawyer and a good deal of a knave or boor; and after being tossed on this kind of blanket for some uneasy months is chosen by a majority of 10 votes out of 100,000 and comes into court, breathless, terrified, with perspiration in drops on his brow, wondering how he ever got there, to take his seat on the bench. And in the very first cause he tries he sees on one side the counsel who procured his nomination in caucus and has defended him by pen and tongue before the people, and on the other the most prominent of his assailants; one who has been denying his talents, denying his integrity, denying him every judicial quality, and every quality that may define a good man, before half the counties in the State. Is not this about as infallible a recipe as you could wish to make a judge a respecter of persons?"

In general, it may be said that in rural communities and in the smaller cities, direct election has given fair satisfac-

tion. There, the judicial office is often sought by leaders of the bar, who are rather widely known in the community and whose ability may be appraised with some accuracy by the voters. The fact that direct election gives fair satisfaction in such communities can hardly be considered a justification of this method of selection, because as the population becomes greater, satisfactory results seem to be attained in fewer instances.

As Charles P. Daly said in the New York Constitutional Convention of 1867:

"The elected judge soon learns that his continuance in office does not depend upon his learning, his ability, or his integrity; that it depends, first, upon the continuance in power of the political party that elected him and to which he belongs; and secondly, upon his ability to secure a renomination at the end of his short judicial term. He may have the learning of Mansfield and the integrity of Hale, but it will avail him little if his party is not in power and if he is not an active and leading member of it."

In the absence of a political sponsorship, the candidate most likely to appeal to the public would be one who is well known in the community and who has a large personal following. Such a following is built at times by political activities and the advocating of one or the other side in major public controversies. The time that has thus been spent in political controversy and in cultivating the voters has been a total loss so far as qualifying the lawyer for a judicial position may be concerned. Then, too, the judge who depends upon popular election for his office, knowing that he must have the favor of the majority of the voters if he is to retain the office and support his family, cannot be censured very strongly if he does not show an inclination to antagonize some strong financial, social, religious, or political group in the community. So long as labor votes for judges who decide cases in favor of labor, and capital throws its influence for those who decide cases in favor of capital; and religious groups those who look with favor upon their particular tenets, and anti-religious groups those who smile on their antics; and the antis those who refuse to enforce the prohibition laws, and the pros only those who enforce those laws to the hilt;—so long may we expect

judges to be mindful of all these things. When majorities make it their business to advise judges "which side their bread is buttered on," we can hardly expect all of the judges to meekly accept the crust.

### BAR PRIMARIES

The development in recent years of the bar primary idea is proof of the recognition by the profession of its responsibility to assist the public in selecting qualified judges in those states having direct election.

The purpose of the bar primary is to improve the judicial personnel. Bar Associations in Cleveland, Detroit, Chicago, Denver, Los Angeles, St. Louis, San Francisco, Duluth, and other cities, have conducted bar primaries of one sort or another. An appraisal of the results in each would necessitate a special study of the industrial, political, racial, and social background in each community. It may be said, however, that campaigns have been confronted with two situations: The first, a strong political machine which selects judges as it does other candidates, on the basis of patronage and political expediency. Where dissatisfaction has resulted, the bar has been successful in breaking into the monopoly of the machine only in instances where scandalous conduct on the bench has crystalized strong public opinion at the particular time; otherwise, the political machine has rather uniformly selected its own candidates, sometimes bowing in the direction of the bar's efforts by nominating less objectionable lawyers. In places like Cleveland, where a judicial election is held separate from political elections, the situation is somewhat different. In a conflict it has largely been not with an organized party, but with ambitious aspirants who had personal strength through publicity or support by organized racial, religious, or economic groups. One fact of considerable importance is that ordinarily the efforts of the bar have been endorsed by other civic organizations, and in most instances by the press. Some difficulty has been experienced in some of the cities by reason of the unwillingness of some of the judicial candidates who had been approved by the bar to leave the campaign strictly in the hands of the bar. The early efforts

of associations were directed merely to taking a poll of the membership and publishing it. The results of this method were not entirely satisfactory, and gradually bar associations in most of the cities mentioned have found it necessary to actively campaign on behalf of the bar nominees. This casts a heavy burden of work and expense upon the association, and it has been questioned whether this effort can be carried on from year to year.

To make the bar primary effective, the opinion of the lawyer should be freely expressed, without electioneering on the part of the candidates; otherwise, the bar becomes little more than a nominating convention to be canvassed in the usual political manner.

In larger cities, where there are from two to five thousand members, it is necessary for a judicial committee to make a study of the qualifications of the candidates, and send questionnaires and biographical sketches to the bar itself to secure an informed opinion. It also becomes necessary for the bar association to accept the majority choice of the poll, even though the officers and judicial committee may believe that the candidate who received a few less votes would be better qualified to serve as a judge.

Bar associations are beginning to realize that if they participate in active campaigns, the participation must be vigorous. In recent contests in some of the cities where bar primaries are held and candidates endorsed, the matter has been followed up in the general election. In at least one instance, this participation took the form of (a) advertising in newspapers; (b) soliciting the assistance of all local, civic, and improvement clubs; (c) obtaining editorial approval of the plan, and candidates; (d) mailing letters to all members of the Chamber of Commerce, and similar organizations; (e) having the individual members of the association agree to mail fifty letters to their friends and clients; (f) distributing the usual campaign cards; (g) using posters and outdoor advertising; (h) enrolling a speakers bureau from the bar to attend all political meetings; and (i) securing the assistance of the younger members of the bar for work at the polling places on election day.

The main result of the bar primaries has been to direct public attention away from political issues to the one issue of the capacity of the judicial candidate to fulfill the office properly. Other things being equal, the influence of the bar has made itself felt in the selection of bar candidates, and in close party fights has thrown the deciding choice in favor of those who appeared to be better qualified. It cannot be denied, however, that the theory of the bar primary is a denial of the principle of direct election, because it assumes that the electorate is not qualified to select judges and must be advised by some other group. Whether that group is a political convention or the bar association may be important in the type of judge selected, but each removes the responsibility of choice from the appointing power. We may generalize by saying that the bar primary has been fairly successful where its opposition has been corruption and individual self-seeking, but that in communities where one party is dominant, the influence of patronage, party loyalty and political rewards has left much to be desired as against the bar's effort to place on the bench judicial experts who will decide the matters before them with an eye single to the attainment of justice.

#### LEGISLATIVE SELECTION

At the time of the Revolution, and for some years thereafter, a majority of the states selected their judges through legislative action. During the Constitution Convention of 1789, this method was proposed for choosing federal judges, but, on the opposition of James Wilson, James Madison, and others, it was rejected. Wilson said:

"Experience showed the impropriety of such appointments by numerous bodies. Intrigue, partiality, and concealment, were the necessary consequences. A principal reason for unity in the executive was, that officers might be appointed by a single responsible person." (Madison's notes from Elliott's Debates, Vol. V., Page 155.)

Although rejected for the federal system, legislative selection spread far and wide, and was in use as far west as Iowa in 1846, as far south as Florida in 1838, and in the

Republic of Texas in 1836. At the present time only Vermont, Rhode Island, South Carolina, and Virginia retain this method. It is understood that in most of these states judges of good character and legal ability have uniformly been selected, and that only occasionally have political considerations dominated a selection. That political considerations sometimes enter into the scheme is understood to be the reason why a few of the states, such as Connecticut, changed; but, in most instances, the onward sweep of democracy brought about direct election.

### THE GEORGIA PLAN

It is interesting to note that Georgia, through its bar association, is now proposing a constitutional amendment for an entirely new method of judicial selection. It is interesting because Georgia is the only state which during Colonial times experimented with direct election, and since that time has tried all of the others. Starting with direct election in 1777 and abandoning it for legislative choice in 1789, and then executive appointment with consent of the Senate in 1868, Georgia returned to legislative selection in 1877, and to direct election of trial judges in 1898. It seems, therefore, to be somewhat of an experimental station. The plan now proposed as a constitutional amendment is as follows:

"At general election next before expiration of term any judge of Supreme or Superior Courts who desires to serve another term, must be approved by the people. His name is placed on a separate ballot with the question: 'Shall this judge be continued in office?' If a majority vote 'no', he retires at the end of his term; otherwise, he is commissioned for another full term. Judges of the Superior Courts are voted on only in their respective districts.

"When a vacancy occurs in the Supreme Court, it is filled by the Governor, with approval of the Senate, from a list of the whole state, in a secret ballot; not more than one lawyer to be nominated from the same judicial district.

"A vacancy in the Superior Courts is filled by the Governor, with the approval of the Senate, from a list

of three lawyers, nominated by the members of the bar of the district where a vacancy occurs, in a secret ballot."

A number of groups are sponsoring somewhat similar methods. These spring from the belief that even the bar primary is not an answer to the problem, and that possibly some method can be formulated that will be superior even to executive appointment.

The Utah State Bar, at its January, 1933, meeting, approved a committee report which provided the following method for judicial selection. The bar, from a list to be made according to its own rules, would submit to the Governor five nominees for a supreme court vacancy and three for a district court vacancy. The incumbent, after serving one term, would be reappointed unless he had been charged with failure to properly discharge the duties of his office, and unless that charge was sustained at a hearing before two-thirds of a committee of fifteen. (Utah Bar Bulletin, January, 1933, page 34.)

The committee of the Ohio Bar Association, at the January, 1933, meeting, suggested a plan whereby the Senate selected a judicial commission, which body should advise and consent to judicial appointments to be made by the Governor.

Serious objection has been leveled against these plans, as against the others, mainly on the ground that they constitute untried experiments involving complications and uncertainties in functioning, and fail to place responsibility in any one official or body, and hence are subject to the complaint that has been directed against methods now in use.

#### APPOINTMENT BY CHIEF JUSTICE OF THE SUPREME COURT

Some consideration has recently been given to the plan of the appointment of the judiciary of the state by the Chief Justice of the Supreme Court, who would be elected as the head of the judicial department. If it is true that there should be a separation of the powers and of the three de-

partments of government, then it seems logical that this method should be followed. There seems to be no reason, even in states committed to popular election, why every functionary of the judicial department should be elected, whereas practically all of those in the executive department are appointed by the Governor or by the heads of a few important departments. This system may be likened to the English plan, under which the Lord Chancellor is responsible for the appointment of all judges of courts of record. A plan somewhat of this character was submitted to the New York Constitutional Convention in 1915. Although it does not appear to have received much consideration, the fact of its introduction is important. It vested the power of judicial appointment in the Chief Judge of the State Court of Appeals. Within the last few years the Cleveland Bar Association recommended that the Chief Justice of the Supreme Court be elected by the people; his associates appointed by the Governor; and that the other judges be appointed by the Chief Justice, with the approval of the Associate Justices. Under this plan, the entire responsibility for the administration of justice would be placed upon the courts. Certainly, the judges before whom the bar practices are in an excellent position to observe and judge of the character and ability of the lawyers before them. The suggestion that the Associate Justices be appointed by some one other than the Chief Justice was evolved to insure that there would be a check on any possible coalition. It is to be observed that, even in this plan, our American characteristic of placing a check on everyone is followed. If the Chief Justice is head of the judicial department, as the Governor is head of the executive department, he should be given power commensurate with the responsibility of the office. Under the present system, his position is of no more importance than those of his fellows on the bench, except that he presides at their meetings and signs orders, when directed by a majority of his associates.

One advantage of placing the responsibility in the hands of the judiciary would certainly be that those who performed their duties promptly and efficiently would secure

recognition, and be promoted to more important posts. This seems to be the plan in some of the foreign countries. There seems to be no good reason why a district judge, who is well qualified, should not advance to the appellate court, if he so desires, and if there is a vacancy. In continental Europe this plan is almost universally followed. In some of those countries, soon after a lawyer has commenced the practice, he indicates whether he intends to remain in the private practice or wishes to specialize in administrative law, or is ambitious to become a judge. From that time on his work is directed accordingly. We will all agree that a judgeship is an office calling for special technical attainment and for peculiar personal qualities, which, for want of a better name, we call judicial temperament. Certainly, it is a combination of ability to determine issues; to weed out all immaterial facts; to decide promptly; to be able to clearly state the reasons for his decisions; and to have some executive ability, so that he will run the court and supervise the functions of the lawyers, and not be run by the lawyers. I might add that patience and long suffering would be very fine characteristics, and would be much used. Of course, the judiciary as a career, after the continental fashion, would only be possible where there is a different form of selection and a permanent tenure of office. An applicant for a judgeship in Germany receives first a minor appointment as assistant judge; and then, from time to time, as his ability and experience warrant, he is promoted through successive grades of judgeships. A somewhat similar system of appointment and promotion is used in France.

#### TENURE

Intimately connected with the question of the selection of judges is the matter of tenure of office. Many times the decision of a prospective candidate for a judicial office, as to whether he will or will not run for it or accept a tendered office, turns on the length of the term. It could hardly be expected that a lawyer at the height of his powers, with a good practice, would give it up to accept a judicial office for a term so short that the main result would be that he would lose his practice by accepting the position, and be up

for reelection or reappointment before he had well learned the duties of the position.

Until the Act of Succession in England in 1689, the judges were appointed and held office during the pleasure of the monarch. Since that time, in England, and in most of the countries of the world, judges have been appointed for life or, more properly, during good behavior.

The remaining method is appointment or election for a limited term of years. Although Massachusetts, Delaware, Maryland, Virginia, North Carolina, South Carolina, New Hampshire, Vermont, and New York provided terms of office during good behavior at the time of the adoption of the federal constitution, all except Massachusetts, Rhode Island, and New Hampshire have now joined the other states in providing a limited term of office. This term varies from two years in Vermont to twenty-one years in Pennsylvania. Most of the states provide a term for trial judges of four to six years and for appellate judges of six to eight years.

The reason for the change in this country cannot be definitely stated, but it was undoubtedly a part and parcel of the movement of democracy, under which everyone was supposed to have the right some time or other to hold every office in the government. Then, too, an appointment for life, good behavior, or a long term of years occasionally proved disastrous, because of the difficulty of getting rid of an occasional judge whose mental or physical powers became impaired, or whose conduct was no longer proper, but who refused to resign, and whose offense was not of a character to justify impeachment; and so, in our customary fashion, instead of providing means for retiring, or causes for removal, we dodge that issue and provide for election or appointment for an exceedingly short term.

The methods customarily employed in removing judges are (1) impeachment; (2) address of both houses of the legislature; (3) abolition of the court over which the judge presides; and (4), in a few states, recall by popular vote. Impeachment, being judicial in its nature, providing a specific charge, and giving the accused an opportunity to be heard, is generally considered the most satisfactory method.

Its disadvantages, as heretofore suggested, are that it can only be used in cases of high crimes and misdemeanors; whereas, in many instances, failing health, an unjudicial temperament, want of learning, tyrannical conduct, prejudices, indolence, lack of decision, carelessness, and a habit of taking cases under advisement and postponing decisions for such length of time until, as has been said, the judge, unhampered by any knowledge of either the law or the facts may, at his leisure, decide the case in a manner which it is to be hoped is, at least satisfactory to him. Impeachment overburdens the legislature, which has other duties to perform, and hence is seldom used. Address of the legislature does not require a trial, and does not require that a judge be guilty of high crimes or misdemeanors, but since it does not provide for a hearing, it might be used as a strictly political weapon. It would seem that a plan under which the Chief Justice of the Supreme Court could retire any judge on part pay, for any satisfactory reason, would be acceptable. This would obviate most of the objection, not only to the present means of removal, but would also permit a consideration of increasing the tenure of office.

Whatever method is used for selecting judges, we may all agree that it should be non-partisan and non-political, and that the bar has a responsibility to see that the best men available are selected, and, when selected, that they are retained in office as long as they satisfactorily perform the judicial function. This is a responsibility the bar cannot and should not shirk. In fact, I may say that I believe the bar is conscious of its full duty. The American Bar Association at this time is re-examining the subject of judicial selection; and I am advised that eighty committees are actively working on the problem for state and local bar associations in twenty-four states. It may be worthy of thought to note that the twenty-four states all select their judges by direct vote of the people. Whether the states with executive appointment and legislative selection are entirely satisfied is beside the point; but the greatest activity is certainly in the states which have the other method. Where the method provided by the state constitution is direct election, I believe the bar should conduct preferential primaries, and

actively support the men best qualified. When constitutions are rewritten or revised, serious consideration should be given to the various methods which have been suggested, to the end that the people may be best served and that we may, indeed, have an administration of justice worthy of the genius of a great nation.

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